Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA

For The Period
From October 1, 1953
Through December 31, 1953

VOLUME 73

SI GARRETT, Attorney General

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QUARTERLY REPORT

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from October 1, 1953, through December 31, 1953, as published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,

Attorney General.

OPINIONS

October 1, 1953

Hon. Allen Thornton
Superintendent of Education
Lauderdale County
Florence, Alabama

Schools—Lauderdale County—County Board of Education—City Board of Education.

1. An expenditure for constructing a school bus garage, warehouse, and carpenter shop, for the use and benefit of the county schools, may be made by the Lauderdale County Board of Education from its allocated portion of the revenue raised by the levies imposed by Act No. 296, General and Local Acts 1949, page 426.

2. Such expenditure may be made even though the buildings will be constructed on land owned by the Lauderdale County Board of Education which lies within the corporate limits of the City of Florence.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of September 2, 1953, is as follows:

"An Act No. 296—H. 777—Rogers, Barnett was passed by the 1949 Regular Session of the State Legislature.

This Act levied a one per cent State sales tax in Lauderdale County. Section 11 of this Act specifies how and where this money can be spent. "In November, 1952, the Lauderdale County Board of Education purchased five acres of land adjoining the City of Florence. It was the plan to build a school bus garage, warehouse and carpenter shop, but before all plans materialized, or in August of this year, the citizens of the area voted to become a part of the City of Florence. Now this five acres lie inside the City limits of Florence.

"The question now arises, will it be lawful for the Lauderdale County Board of Education to spend the money raised by this Act in building the garage, warehouse, carpenter shop or other buildings on the above mentioned five-acre tract of land?

"Please advise if it is possible to do this."

It is my opinion that an expenditure of revenue raised by the levies imposed by Act No. 296, General and Local Acts 1949, page 426, for the purpose of building a school bus garage, warehouse, and carpenter shop on

the tract of land in question, would be permissible under the terms of this act.

Act. No. 296, supra, provides for the levy of certain privilege and excise taxes both by the City of Florence, located in Lauderdale County, Alabama, and by Lauderdale County, outside the city limits of Florence. These taxes are to be paid to the Probate Judge of Lauderdale County and the revenues therefrom are to be distributed by him to the Lauderdale County Board of Education and the City Board of Education in Florence, in the same proportion as school funds are allocated by the State of Alabama to those respective bodies. (There is a temporary provision making the city's share payable for the first five years to its general fund, rather than to the City Board of Education.)

Section 11 and 12 of the Act provide how the revenue thereby raised is to be spent by these recipients. Section 11 stipulates that the County's share (outside the limits of the City of Florence) shall be used "exclusively for school purposes and solely for capital outlay, construction and maintenance, of the public schools of Lauderdale County, outside the limits of the City of Florence." Similarly, Section 12 provides that the City's share is to be used (after the expiration of the five-year period mentioned above) "solely for capital outlay and maintenance of the public schools of said City of Florence."

Clearly, an expenditure to construct a school bus garage, a warehouse and a carpenter shop (the latter two buildings presumably to be used for the storage and repair of school equipment and supplies) is one made for "school purposes," as required by the Act. Such an expenditure, furthermore, is one made both for construction and also as "capital outlay." And, in a broader sense considering the purpose for which the buildings are to be used, it may even be said that the expenditure is one for the "maintenance of the public schools." (In this connection the term "public schools" is to be construed in a general sense, as more or less synonomous with the public school system, and not as referring only to the school buildings actually used for instruction of pupils. Thus a previous opinion of this office, Biennial Report of Attorney General, 1930-32, page 417, is distinguishable and is not applicable to the present situation.)

The proposed expenditure, therefore, complies with all the requirements of Act. No. 296, supra, unless there is some problem presented by the fact that the site of the proposed buildings now lies within the corporate limits of the City of Florence.

Turning the language of the Act and considering the method and purpose of imposing the levies in question, it seems obvious that the phrase in Section 11, "outside the limits of the City of Florence," is intended to modify and limit the preceding phrase, "the public schools of Lauderdale County." That is to say, it is not the expenditure, nor yet the construction, which the Act requires to be made outside the city limits, but rather the requirement is that the expenditure must be for the benefit of schools which are outside the city limits of Florence. A consideration of the respective jurisdiction of the County and the City Boards of Education

and the allocation, under this Act, of funds to each, makes this the only possible interpretation of the section. I presume that the purpose of the contemplated construction is to benefit the schools of the county, as opposed to those of the city.

The only additional question presented is whether there is any provision in our general laws which would prohibit the construction by a county board of education, on a site lying within the corporate limits of a city, of buildings to be used solely for a garage, and for the maintenance and repair of county school property, all for the benefit of the county schools. I can find no such prohibition in our statutes.

It is true that Title 52, Section 160, Code of Alabama 1940, dealing with the powers of the city board of education, provides that all property held or later acquired, for school purposes to be held in trust by the city board for the use of the public schools of the city. A preceding section of the same Title, Section 158, vests in the city board of education the administration and management of the free public schools located within the city and annexed school districts. Obviously Section 160, supra, is complementary to Section 158, supra, and is merely intended to vest in the city board legal title to such property as is used for school purposes and for the benefit of the schools of the city. See Biennial Report of Attorney General, 1928-30, page 961. There is, however, no reason to interpret Section 160, supra, as vesting title to all property, within the city limits used for school purposes, including that which is used solely for the benefit of COUNTY schools, in the city board of education. It is only when the ownership of the property by an agency other than the city board would result in an infringement upon that board's jurisdiction over city schools that Section 160, supra, must be given effect. This, of course, is most apparent in the case of school buildings actually used for the instruction of pupils. Pupils, and not property, are the basis for a board of education's jurisdiction. Thus, Title 52, Section 83 et seq., ode of Alabama 1940, as amended, make provision for the transfer of control of a school from the county to the city board, when part of the territory embracing said school (in which its pupils would live) is annexed to a city. But again, there is no such requirement when the annexed territory includes merely maintenance shops and buildings having no relation to the instruction of children.

In conclusion, I can see no difference between the ownership by the County Board of Education of Lauderdale County of the buildings which you mention, even though they are located within the city limits of Florence, and that of any other non-school property owned by a county but located within the corporate limits of a municipality within that county. And, as previously stated, there is no objection, under the terms of Act No. 296, supra, to the expending of funds for the construction of such buildings. Consequently, you are advised that such an expenditure may lawfully be made.

Very truly yours,

SI GARRETT
Attorney General

October 1, 1953

Hon. Q. P. Flournoy, Mayor
City of Chickasaw
Mobile County
Chickasaw, Alabama

Census—Municipalities.

The provisions of Title 37, Section 483, Code of Alabama 1940, have no application to a city wherein a municipal census taken as provided for in Section 483, supra, discloses the population of the city to be in excess of seven thousand at the time the census is taken.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of September 18, 1953, is as follows:

"Reference is made to Sections 481 and 483 of the 1940 Code of Alabama. "I shall appreciate it if you will advise me whether or not the City with a population of 5,000 according to the last federal census, and discovers that it has a population of 7,001, comes within the provisions of Section 483 and has effected an automatic change in its form of government."

Title 37, Section 483, Code of Alabama 1940, provides as follows:

"§483. Census authorized to be taken in cities or towns of seven thousand inhabitants or less, effect of.—Where the census of any city or town in this state of seven thousand inhabitants or less has been or may hereafter be taken as provided by this article, and the report of the census thus taken has been or may hereafter be filed with the secretary of state, the census purporting to be a true and correct enumeration of the inhabitants residing in said cities and towns is, and shall be, ratified, confirmed and validated, and the report of said census, which has been or may hereafter be filed, shall for all purposes govern, and be taken as the true and correct census for all such cities and towns in the state, under seven thousand inhabitants, WHEN SO TAKEN. The form of government of such cities and towns shall be governed and controlled by such census when the same is so taken and a report thereof is filed in accordance with the provisions of this section." (Emphasis supplied.)

It is to be noted that the above section, as far as it pertains to the form of government of a city or town, does, by its very wording, have ap-

plication only to a city or town wherein the municipal census therein provided for determines that the city or town has under seven thousand inhabitants at the time the municipal census is taken.

It is, therefore, my opinion that the provisions of Section 483, supra, have no application to a city wherein a municipal census, taken as provided for in said section, determines the population of a city to be 7,001.

Yours very truly,

SI GARRETT
Attorney General

October 2, 1953

Hon. Bert E. Thomas
Tax Assessor
Mobile County
Mobile, Alabama

Assessments—Tax Assessors—Escapes.

Act. No. 236, General Acts 1953, approved July 27, 1953, which permits the escape assessment of improvements on realty previously assessed as unimproved, is not retroactive in operation, and such escape assessments may not be made for any assessment which become final before the date of approval of said Act.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of September 10, 1953, is as follows:

"I am enclosing a copy of an Act (Act No. 236, General Acts 1953, approved July 27, 1953) which was passed, signed and approved July 27, 1953, and which pertains to escape property. In your opinion is this

Act retroactive, and can we go back five years under this Act?"

The Act in question (Act No. 236, General Acts 1953, approved July 27, 1953) is an amendment of Title 51, Section 53, Code of Alabama 1940. The only change made by the amendment is the insertion, in the first sentence of the section, of the phrase, "including any improvements on Real Estate assessed as vacant property." Such improvements are now specifically in-

cluded in the classification of property which is subject to escape assessments.

Prior to the passage of this amending act, it was the law in Alabama that after a valid assessment on realty, which omitted to list improvements on the proprety, had become final, and payment of the tax had been made, the omitted improvements could not later be assessed as an escape. The reason is that the improvements are considered part of the realty, and the assessment when made covers both. Having been made on the unimproved realty, and having become final, the assessment may not be reopened by the State when untaxed improvements are discovered. **State v. Mortgage-Bond Co. of New York**, 224 Ala. 406, 140 So. 365.

The amending Act No. 236 has, therefore, created a new class of escapes—improvements on realty—but at the same time it has retained the provision of Section 53, supra, which permits the assessor to list escapes which arose during any of the five years preceding the year of listing. Your inquiry thus concerns the permissibility of your making escape assessments for improvements for tax periods within the past five years but prior to the passage of Act No. 236, supra.

You are advised that this Act is not retroactive and that escape assessments of this type may not be made for any assessment which became final prior to the date of passage of the Act.

The **Mortgage-Bond Co.** case, supra, stated the general principle that when an assessment becomes final and taxes are paid accordingly, the proceedings are binding upon the State as well as the property owner. In addition, in that case the Supreme Court had before it a statute with a similar provision for listing for assessment and taxation any escaped improvements on realty (Act No. 259, General Acts 1931, page 295). That statute was applicable only to counties having a population of 300,000 or more, and hence only to Jefferson County, and it did not specifically give authority to make such escape assessments for the preceding five years. (The authority was present, however, and was incorporated in the statute by reference to the powers of county tax assessors. See Section 39, Act No. 172, General Acts 1923, page 152.)

The contention was made that the statute was remedial and therefore applied to all cases coming into court after its enactment, regardless of when the cause of action arose. The Court's answer to this argument was as follows (224 Ala., at page 409):

> "The argument rests upon the assumption that the improvements have in fact escaped taxation, but there has heretofore been no remedy, and this statute provides a remedy.
>
> "What we have written negatives such assumption. The proprety as a whole has been assessed, and the tax lien satisfied as to improvements as well as the lands.
>
> "This statute must be held, therefore, to create a new class of escapes. Otherwise there would have been no occasion for it.

"A statute intended to meet defects of substantive law, to remedy evils growing out of the state of the law, is not a remedial statute within the rule of construction under discussion.

"We must hold this is not a remedial statute, but one of substantive law, making that an escape which theretofore was not an escape. To apply it to cases where taxes had been assessed upon the realty of which the improvements were a part and the tax lien fully discharged is to create a new charge and a new tax lien not therefore known to the law.

"It is, therefore, subject to the general rule that statutes are never retroactive, unless made so in clear and explicit terms. Ex parte Buckley, 53 Ala. 43."

This reasoning is likewise controlling in the case of Act No. 236, supra, here under consideration. Certainly it cannot be said that the Act is made retroactive "in clear and explicit terms." The provision permitting escapes arising during the preceding five years to be assessed was already a part of Section 53, supra—the amending act did not add it. The amending act merely created a new class of escapes and provided for its becoming effective upon passage and approval by the governor. No retroactive operation of the amendment is provided for. It is not necessary, therefore (just as it was held unnecessary in the Mortgage-Bond Co. case, supra) to discuss the question of whether such retroactive operation would destroy vested property rights.

My conclusion is that Act No. 236, supra, has no application to property on which assessments became final before the date of approval, July 27, 1953.

Yours very truly,

SI GARRETT
Attorney General

October 6, 1953

Hon. J. L. Kirby
Treasurer of Jefferson County
203 Courthouse
Birmingham 3, Alabama

Solicitors—Funds—Jefferson County—Claims—Warrants.

1. Payments should be made from the Solicitor's Fund, Bessemer Division, established by Act No. 419, General and Local Acts 1951, page 742, by warrant drawn upon the County Treasurer of Jefferson County by the Deputy Circuit Solicitor of the Bessemer Division.

2. Claimants against such fund should present their claims to the Deputy Circuit Solicitor of the Bessemer Division for

his review and approval and issuance of warrant by him in payment thereof.

3. Payment of cost of extradition from such fund is not unauthorized in all instances but rests within the sound discretion of the Deputy Circuit Solicitor of the Bessemer Division, and will not be considered unlawful in the absence of a showing of abuse of this discretion.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of February 9, 1953, is as follows:

"The Legislature during its 1951 session passed Act No. 419 found at page 742 of the 1951 General Acts which created a Solicitor's Fund for the Bessemer Division of Jefferson County. This act among other things made the Treasurer of Jefferson County the custodian of this fund.

It authorizes the County Treasurer to pay out funds, upon warrants drawn upon the Treasurer by the Deputy Solicitor, provided there is sufficient amount of money in said fund to pay the same.

"In going over a number of claims that have been filed by the Deputy Solicitor against this fund since August 30, 1951, I have noticed that the Solicitor has not made any attempt to itemize said claims nor has he attached any receipts supporting these claims.

"I respectfully call your attention to Act No. 482 of the 1931 General Acts, found at page 559, wherein the State and County are made liable for payment of costs and expenses in extradition cases.

"For your consideration, I am enclosing a few of the claims to which I refer so that you may analyze them as to whether or not they are legal claims against the County in their present form.

"In view of the above I submit the following questions for your consideration:

"(1) Would the claims as filed constitute a legal claim against the State and County for reimbursement of moneys spent from the Solicitor's Fund in the extradition of prisoners?

"(2) Should the Treasurer disburse money from the Solicitor's Fund or any other fund without a properly itemized claim, unless expressly otherwise provided by law?

"(3) Do you consider the enclosed claims properly itemized?

"Your usual prompt consideration of the above will be appreciated."

In considering your questions it is necessary that I first give con-

sideration to the administration and application of the provisions of Act No. 419, General and Local Acts 1951, page 742, referred to in your request for opinion. Such act provides, in part, as follows:

> "Section 1. That there is hereby appropriated out of the Solicitor's Fund of Jefferson County, Alabama, monthly, on the 10th day of each month, a sum of money equal to the Solicitor's fees paid into said fund by or from the Bessemer Division of the Circuit Court of Jefferson County during the next preceding calendar month. Said monies so appropriated out of said solicitor's fund shall remain in the custody of the Treasurer of Jefferson County, shall be known as 'Solicitor's Fund, Bessemer Division,' and shall be paid out by the Treasurer of said County upon warrants drawn upon said Treasurer by the Deputy Circuit Solicitor elected by the people in and for the Bessemer Division of said County; and said Deputy Circuit Solicitor shall have the power and authority to employ any assistance or assistants and to incur any expenses he may deem necessary to properly administer justice, including the payment of any reporters for taking of statements or transcribing testimony or reporting the preliminary trial of felonies in the Bessemer Civil and Misdemeanor Court, and all such expenses shall be paid out of said 'Solicitor's Fund, Bessemer Division,' on warrants drawn by said Deputy Circuit Solicitor upon said Solicitor's Fund, provided there is a sufficient amount of monies in said fund to pay said compensation or expenses at the time same is due under the provisions of this act."

This act creates a special county fund known as the "Solicitor's Fund, Bessemer Division," makes you, as County Treasurer of Jefferson County, custodian of such fund, and specifies the purposes for which and the manner by which payments shall be made from such fund. With reference to these latter provisions, it states that the Deputy Circuit Solicitor for the Bessemer Division of the Circuit Court of Jefferson County shall have the power and authority to employ any assistants, and to incur any expenses he may deem necessary to properly administer justice, and that all of such expenses shall be paid out of the Solicitor's Fund, Bessemer Division, on warrants drawn by said Deputy Circuit Solicitor upon such fund, provided there is sufficient money in the fund to pay such warrants. Such act further provides, with reference to your duties in the matter, that the monies constituting such fund shall be paid out by the Treasurer of Jefferson County upon warrants drawn upon said Treasurer by the Deputy Circuit Solicitor of the Bessemer Division.

I note in your request that you make frequent reference to "claims" filed with you or presented to you by the Deputy Circuit Solicitor requesting that payment be made from this fund. It would appear to me that this is not the correct terminology for the documents presented or filed with you for payment but that same are, and should properly be, warrants drawn by such Deputy Circuit Solicitor upon the fund in question.

It is my conception of the proper procedure to be followed in administering and making payments from the fund in question that claimants

upon such fund should present their claims to the Deputy Circuit Solicitor of the Bessemer Division for his review and approval. Further, that if such Deputy Circuit Solicitor reviews and finds such claims correct, he should thereupon approve same and draw his warrant upon you, as the Treasurer of Jefferson County, requiring that such amount be paid from this fund if there be sufficient money therein to permit payment of such warrant. Under this interpretation of Act No. 419, supra, it is the Deputy Circuit Solicitor of the Bessemer Division, and not you as County Treasurer, who would be required to audit and approve claims filed against this fund. It is he, and not you, who should require such itemization, or other proof, as is necessary for both himself and the post-auditing officials to determine the lawful nature and accuracy of the claims presented for payment from this fund. This matter I am treating in a separate opinion being rendered to the Deputy Circuit Solicitor of the Bessemer Division pertaining to this same question.

Regarding your duty and responsibility in the matter, I am of the opinion that if the warrants presented for payment be regular upon their face and in payment of claims of a character with which the county, or the specific fund, is by law chargeable, and, further, that there be nothing appearing of record or known to you, indicating the invalidity of such payment, then you should make payment of such warrants if there be money in the fund in sufficient amount. You might see in this regard the case of **Norwood v. Goldsmith, Treasurer,** et al, 168 Ala. 224, 53 So. 84, and **Mobile County v. Williams, Judge,** 180, Ala. 639, 61 So. 963. Also Title 62, Section 178, Code of Alabama 1940.

With the above observations I turn to your specific inquiries. In reply to the first of same, I would advise that I feel that, in the absence of a showing of an abuse of discretion in the matter, expenditures may be made from this fund in reimbursement of expenses incurred in removing absconding defendants to this State for trial. It is true that such expenses of removal should be, and normally are, paid under the provisions of Title 15, Sections 72 and 75, Code of Alabama 1940. These provisions of law I am sure are well-known to the Deputy Circuit Solicitor of the Bessemer Division. It is equally true that such Deputy Circuit Solicitor should exercise sound discretion and good judgment in making expenditures from this fund, and should not be unmindful of the fact that such fund represents public money and s h o u l d not be needlessly disbursed in payment of expenses otherwise provided for. On the other hand, under the broad latitude granted the Deputy Circuit Solicitor in the expenditure of money from this fund, i.e., "any expenses he may deem necessary to properly administer justice," I do not feel that it could be said, in the absence of a showing of abuse of discretion on the part of the Deputy Circuit Solicitor, that expenditures for this purpose are unauthorized. I can visualize conditions and circumstances under which it might be said to be necessary to the proper administration of justice that such payments be made from this fund; and hence, I cannot hold that in all cases such expenditures would be unauthorized, but rather that same

should be made in the sound discretion and through the exercise of good judgment on the part of the Deputy Circuit Solicitor.

Your second inquiry I believe I have previously answered by stating that the money in such fund should be disbursed upon warrant drawn upon you by the Deputy Circuit Solicitor rather than upon claim presented to you. I have earlier outlined my opinion as to your duties and responsibilities in the payment of such warrants.

Answer to your third inquiry becomes unnecessary in view of the reasoning previously set out. As noted, this matter is being discussed in a separate opinion addressed to the Deputy Circuit Solicitor of the Bessemer Division.

Yours very truly,

SI GARRETT
Attorney General

October 6, 1953

Hon. Howard H. Sullinger
Deputy Circuit Solicitor
Jefferson County
Bessemer Division
Bessemer, Alabama

Solicitors—Funds—Jefferson County—Claims—Warrants.

1. Payments should be made from the Solicitor's Fund, Bessemer Division, established by Act No. 419, General and Local Acts 1951, page 742, by warrant drawn upon the County Treasurer of Jefferson County by the Deputy Circuit Solicitor of the Bessemer Division.

2. Claimants against such fund should present their claims to the Deputy Circuit Solicitor of the Bessemer Division for his review and approval and issuance of warrant by him in payment thereof.

3. Claims so presented should be in such form and contain such itemization, or other proof, as to enable the Deputy Circuit Solicitor and the post-auditing officials to determine the lawful nature and accuracy of the claim.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion under date of March 3, 1953, is as follows:

"'The Legislature at its 1951 regular session passed Act No. 419 (General Acts of Alabama Special Session 1950, Special and Regular Sessions 1951, Vol. 1, page 742) which act created a Solicitor's Fund for the Bessemer Division of Jefferson County, Alabama, and the monies appropriated to said fund being Solicitor's fees collected by the Bessemer Division of the Circuit Court of Jefferson County. You will note that the monies in said fund 'shall be paid out by the Treasurer of said County upon warrants drawn upon said Treasurer by the Deputy Circuit Solicitor elected by the people,' etc.

"Since the establishment of the fund it has been paid out by the County Treasurer on warrants drawn and signed by me as Deputy Circuit Solicitor elected by the people. These funds are used as you know for the purpose of bringing witnesses and defendants back into the State from other States, and for various types of undercover work including purchases of illicit liquors, narcotics and other types of illegal traffic. The officers using these funds have accounted to me for the disposition of same.

"The County Treasurer now advises me that the State Auditor has advised him that these funds cannot be paid out by the Treasurer, even though I have drawn warrants on the Treasurer for these funds, unless and until itemized receipts are presented to the Treasurer showing the ultimate disposition of the monies so requisitioned by me.

"Since you are familiar with law enforcement you will recognize that the above requirement, while it may make sense to some bookkeeper or auditor, would make it impossible to use this fund for the purposes for which it is set aside, viz, law enforcement in the Bessemer Division of Jefferson County.

"Not only would our investigators be required under this ruling to advance funds necessary to finance their activities, but would also be required to get a receipt from every bootlegger or dope peddler from whom they bought any illicit goods and then turn these receipts in to the County Treasurer before they could be reimbursed out of my Solicitor's Fund for the amounts so expended.

"I understand that this question was raised a great many years ago in regard to expenditures made by the Solicitor of Jefferson County out of his Solicitor's Fund, and that the Courts held that he could not be required to account for the ultimate disposition of said funds but only that the funds should be paid out upon warrants drawn and signed by him. I do not have this case at hand but will search for it and if I find it forward it to your office.

"Also the act creating my Solicitor's Fund states specifically that it shall be paid out upon warrants drawn by me, and does not require

that a detailed accounting of the funds so drawn out shall be furnished the Treasurer of said County.

"I shall appreciate it very much if you can advise me and the Hon. Joe Kirby, Treasurer of Jefferson County, that these monies (which are collected out of criminal defendants and are to be used for law enforcement in this County) shall be paid out on a warrant of the Deputy Circuit Solicitor elected by the people, as provided by act No. 419, and that no further accounting can be required of the Deputy Circuit Solicitor for the ultimate expenditure of these funds.

"P.S. Since writing the above I have read the case of Henry vs. State ex rel Welch, 76 So. 417, 200 Ala. 475 in which the Supreme Court of this State held that payments from the Solicitor's Fund in this County were to be made at the discretion of the Solicitor, and awarded mandamus to enforce payments. For your further information, all of the monies in my fund consist of Solicitor's fees—there being no contribution made to the fund out of the general fund of the County."

I should advise that under date of February 9, 1953, the Honorable J. L. Kirby, Treasurer of Jefferson County, addressed an inquiry to me concerning the same matters contained in your request. I have, of necessity, considered such requests together.

In my reply to Mr. Kirby I have advised, and I so advise you, that, it is my opinion, from a consideration of Act No. 419, General and Local Acts 1951, page 742, the monies constituting the Solicitor's Fund, Bessemer Division, established by such act, are to be paid out by the Treasurer of Jefferson County upon warrant drawn upon such Treasurer by the Deputy Circuit Solicitor of the Bessemer Division. I have further advised Mr. Kirby that, in my opinion, claimants upon the fund here in question should present their claims to you, as Deputy Circuit Solicitor of the Bessemer Division, and that it should be you, and not Mr. Kirby, who would be required to review and approve such claims and, if approved, issue warrant for their payment. I have also advised Mr. Kirby that it is you, and not he, who should require such itemization, or other proof, as is necessary to enable both yourself and the post-auditing officials to determine the lawful nature and accuracy of the claims so presented. Consequently, I am in position to advise you that the monies constituting the Solicitor's Fund, Bessemer Division, are to be paid out on warrant drawn by you, as Deputy Circuit Solicitor of the Bessemer Division, upon the Treasurer of Jefferson County, and that it is you, and not such Treasurer, who should make inquiry and determine the lawfulness and accuracy of claims presented for payment from such fund.

However, I am not in position to advise you that no other or further accounting can be required of you for the ultimate expenditure or disposition of this fund. Such a holding would be contrary to all known public policy and would vest in you a power and authority not enjoyed by other public officials administering public monies.

It is without question that this particular fund is a special fund of

Jefferson County, established for a specific purpose and to be administered in keeping with the law applicable thereto. The fund consists of public money belonging to the citizens of Jefferson County. The Treasurer of Jefferson County is the custodian of such fund, charged with its safe-keeping, while you, as Deputy Circuit Solicitor of the Bessemer Division, are charged with the administration and expenditure thereof. Each of you, as public officials, owe an obligation of trust to the people of the county with respect to this fund.

It is my opinion that public policy demands that public officials administering public funds be held to an accounting for their use of such funds. Our statutes on this particular subject all point to this conclusion. On the other hand, I am not unmindful of the purpose for which this particular fund, and funds of like nature, were established, and I am fully aware of the difficulty of maintaining strict accounting records as to the disposition and use of such funds. Some of these difficulties are pointed out by you in your request for opinion.

In view of the above conflicting positions, I feel that concessions must be made as to each. As I have stated earlier, it is my opinion that claimants upon the Solicitor's Fund, Bessemer Division, should present such claims to you, as Deputy Circuit Solicitor of the Bessemer Division, and that such claims should receive your review and approval before warrant be drawn by you upon the Treasurer for payment from such fund. Such claims when so presented to you should be in a form prescribed by you, should be sworn to by the claimant and should contain such itemization, or other proof, as to enable both yourself and the post-auditing agency or official to make determination as to the legitimate nature of the claim presented and the accuracy of same. In so doing it goes without saying, I do not feel that you should require receipts from dealers in illicit narcotics or liquors or other contraband products. Such would be an absurd requirement. Neither do I feel that you should make other similar requirements detrimental to your purpose of enforcement of the criminal laws and the administration of justice. On the other hand, I do feel that, without doing violence to your primary purpose, you should require a degree of itemization as to the purported expenditures of the claimants upon such fund and such other reasonable and necessary proof of the actual expenses incurred by these claimants as you may desire. Such would better enable you to properly audit such claims and would likewise enable you to account for such expenditures when your records are reviewed by the post-auditing officials. I, therefore, advise that, in my opinion, such system of procedure should be installed and followed by you.

I might suggest that, if you have further question as to the system or accounting procedure to be followed by you with reference to this fund, you confer with the Chief Examiner of Public Accounts, for under the terms of Act No. 351, General Acts 1947, page 231, it is this official who should aid and assist in the installation of adequate accounting measures by which you should administer this fund, and who is likewise charged with making audit of the records pertaining to same.

I have reviewed the decision of the court in the case of **Henry v. State, ex rel. Welch**, 200 Ala. 475, 76 So. 417, referred to in your request for opinion, and I find nothing therein to the effect that the Deputy Circuit Solicitor can in no way be required to account for expenditures from the fund, or like funds, here in question, although I do feel that such decision supports the conclusion here reached that it is the Deputy Circuit Solicitor, and not the County Treasurer, who is charged with the actual administration of such fund.

Yours very truly,

SI GARRETT
Attorney General

October 9, 1953

Hon. Ralph P. Eagerton
Chief Examiner
Department of Examiners
of Public Accounts

CAPITOL
Securities.

1. Under the terms of Act No. 241, General Acts 1953, approved July 27, 1953, securities which are registered with the federal Securities and Exchange Commission are exempt from registration with the Alabama Securities Commission, and the latter Commission has no authority to require the issuers of such securities, including those previously registered with it who now claim the exemption, to comply with statutory requirements of posting bond, filing reports, and paying fees.
2. In the case of securities exempted by Act No. 241, supra, reports and fees coming due after the date upon which the exemption is claimed under said Act need not be filed with said Commission.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of September 21, 1953, is as follows:

"In view of a prospective examination to be made by this Department of the records of the Alabama Securities Commission, your official opinion is requested on the following matter.

"A recent amendment to the Alabama Securities Act (Act No. 241, General Acts 1953, approved July 27, 1953) provides for an exemption

from the registration requirements of said Act for securities which are registered with the Securities and Exchange Commission. This amendment clearly exempts such securities if application for the exemption is made in a certain manner and a fee is paid to the Alabama Securities Commission. The amendment does not, however, make clear the status of securities which were previously registered with the Commission but which would be eligible for the exemption if application therefor were made subsequent to the passage of the new amendment.

"In the case of securities previously registered the customary procedure followed by the Commission has been to issue an order entitling a certain amount of the securities in question to be sold in this State provided that certain conditions were fulfilled by the registrant. These conditions ordinarily included the maintaining of a surety bond and the filing of periodic financial reports, each accompanied by a filing fee, during the period the registration remained in effect.

"My question, therefore, is whether Act No. 241, supra, makes it no longer necessary for registrants of securities previously registered but now covered by the exemption to continue to comply with these conditions now that the new amendment has become effective. That is, must such registrants continue to obey the administrative order issued by the Commission so long as their registration remains active even though they would now be entitled to the benefit of the exemption if they made a new application?

"A secondary qutstion involves the necessity for such registrants to file a financial report (and pay the requisite filing fee) for the quarterly period beginning July 1, 1953, and ending September 30, 1953. This report becomes delinquent if not filed within thirty days after the latter date.

You will note that Act No. 241, supra, was approved and became effective on July 27, 1953. If the registrants mentioned above are excused by the new amendment from filing fees should they nevertheless file such a report for the quarterly period extending from July 1 through September 30?"

Act No. 241, General Acts 1953, approved July 27, 1953, reads in part as follows:

"Section 1. Each security with respect to which a registration statement has been filed with the Securities and Exchange Commission of the United States and is in effect, permitting the offering of such securities, and all persons dealing in or transactions relating to such securities, shall be exempt from all requirements and provisions of Title 53 of the Alabama Code of 1940, so long as the registration statement is effective to permit the public offering of such security. The exemption shall be as extensive as if set forth in Title 53, Section 4, Alabama Code of 1940. In order for a security or securities to be

accorded the benefit of the exemption herein provided, however, a copy of the official prospectus, together with a statement that a registration statement covering such security or securities has been filed with the Securities and Exchange Commission of the United States and that such registration is in effect, or will be in effect before the offering is made, and permits or will permit the offering of such security or securities, and describing the securities and the amount thereof to be offered in Alabama, shall have first been filed with the Securities Commissioner by a dealer who is then registered as a dealer in the office of the Securities Commissioner; and the fee required to be paid for the registration of securities by Section 10 of Title 53, Alabama Code of 1940, shall be paid to the Commissioner."

This statute thus creates a new class of exemptions for securities which have been registered with the federal Securities and Exchange Commission. These securities are exempt from all requirements and provisions of the Alabama Securities Act, including, of course, the requirements of registration with the Alabama Securities Commission and compliance with any of that Commission's regulations and administrative orders. Prior to the passage of this Act, any of such securities which were to be sold in Alabama were normally subject to these state requirements.

I am informed that the Alabama Securities Commission's procedure, upon receiving and approving an application for the registration of securities to be sold in Alabama, is to issue a formal order admitting a specified amount (that applied for, or less) of the securities to the register of qualified securities. Such securities may then be offered for sale to the public by any duly registered dealer so long as the total amount of such sales does not exceed that amount which has been registered. If the issuer desires to sell additional amounts, a new application for a supplemental registration must be made.

As conditions of each such order of registration, the Commission customarily requires that the issuer of the securities post a surety "blue sky" bond and make periodic financial reports, accompanied by filing fees, to the Commission. Such reports are made as long as the registration remains active, i.e., until the securities covered by it are sold or withdrawn from sale. Both of these requirements are prescribed by statute—that of the bond by Title 53, Section 12 (3), Code of Alabama 1940, and that of quarterly financial reports and filing fees by Title 53, Section 15 (1), Code of Alabama 1940. (In addition to these quarterly reports the Commission also requires each registered issuer to submit an annual audit report, authority for requiring such additional report also being found in Section 15 (1), supra.)

Act No. 241, supra, in removing a certain class of securities from the entire operation of the Alabama Securities Act (Title 53, Code of Alabama 1940), unquestionably takes away the authority of the Commission to impose such requirements in the case of a security for which application for exemption is made under the terms of the Act. Your inquiry involves the question of whether or not the Commission's authority is also removed

in the case of securities covered by a registration made prior to the passage and approval of Act No. 241, supra, which was still active at the time of passage of said Act, with the surety bond, financial reports and other requirements all in effect under the Commission's order, but which securities have now (by virtue of being registered with the S. E. C.) become qualified for the exemption afforded by the new Act. In other words, does Act No. 241, supra, remove the necessity of maintaining a bond, filing reports and paying filing fees after the date of passage and approval of the Act, in the case of all securities falling within its terms (those currently registered with the S. E. C.), or are these requirements removed only in the case of those securities of this nature for which the first application with the Commission is one for exemption under the terms of the Act?

It is my opinion that Act. No. 241, supra, applies to securities previously registered as well as to subsequent applications, and consequently the Securities Commission should not now require bonds and reports, or collect filing fees, for any security previously registered with the Commission for which an S. E. C. registration statement is currently in effect, provided that an affirmative request for the new exemption is made and the other requirements of the Act are met.

The reason for this conclusion is found in the wording of the Act. Section 1 provides that each "security" (as defined in Section 2) for which an S. E. C. registration is in effect, "shall be exempt" from all requirements of Title 53, Code of Alabama 1940, provided that certain steps have been taken. These steps are: (1) A copy of the prospectus, together with a notification that an S. E. C. registration statement is or will be in effect, is filed with the Commission by a registered dealer; (2) a statement describing the securities and specifying the amount thereof to be offered for sale in the State is likewise filed; (3) a fee, based on the amount of securities to be offered, is paid to the Commission, this being the same fee prescribed, in the case of registration, by Title 53, Section 10 Code of Alabama 1940.

I am informed that these steps have been taken in each case of an S. E. C. registered security which has been registered with the Commission as a part of its regular registration procedure. In fact, considerably more than this is required where securities are registered; the procedure established by the new Act is a simplified one for a certain class of securities which have already been subjected to stringent registration requirements by the federal regulatory body.

In the case of all securities which it has registered, therefore, the Commission has received all the information and the registration fees required by Act No. 241, supra. It remains merely for a proper request for the exemption to be made by a registered dealer, making reference to the fact that the appropriate information has already been filed and the necessary fees paid. If there has been no intevrening change in status, that is, if the securities are ones for which an S. E. C. registration statement is currently in effect, it follows that the exemption afforded by the

new Act takes effect at any time it is claimed after the passage and approval of the Act, July 27, 1953. Subsequent to such time of claiming the exemption, the Commission has no authority to impose requirements such as bonds, reports and filing fees. Consequently, the requirements previously imposed by administrative order will no longer be effective since they have been removed by a legislative enactment establishing the new exemption. (This would not be true, of course, of any requirements arising by virtue of an independent agreement or contract made between the Commission, or its agents, and a dealer or issuer. Such an agreement would remain in effect and would not be superseded by the new Act. The requirements here concerned, however, arise solely under specific provisions of Title 53, Code of Alabama 1940, to which Act No. 241, supra, makes reference.)

In reply to your second question, the effective date when the requirements which the Commission has previously made under Title 53, supra, will become inoperative, in the case of securities coming within the exemption established by Act No. 241, supra, is, as previously stated, the date when such exemption is individually claimed, at any time subsequent to the date of approval of said Act, July 27, 1953. Until the time the exemption is claimed, reports and fees should in each case be collected by the Commission; whether or not the claim is made before the due date of any particular reports, such as September 30, 1953, is a question of fact to be determined in each individual case.

Yours very truly,

SI GARRETT
Attorney General

October 16, 1953

Hon. L. Q. Box,
Judge of Probate,
Blount County,
Oneonta, Alabama.

Inferior Courts—Judges—Statutes.

Where Local Act No. 600, Acts of 1953, approved Stepember 15, 1953, abolished the Intermediate Court of Blount County, Alabama, and created in lieu thereof the Law and Equity Court of Blount County, Alabama, and said Act appears on its face to be enacted in good faith and not as a colorable pretext or sham, the judge of the Law and Equity Court is entitled to the salary prescribed in the Act creating said court, although he is the same person who served as judge of the Intermediate

Court at a less salary than is now prescribed for the judge of the Law and Equity Court.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of October 8, 1953, is as follows:

"The Legislature abolished the Intermediate Court of Blount County for which a judge was elected by the people, last November at a salary of $250.00 per month.

"The Legislature created the Law and Equity Court of Blount County and named the same man judge at an increased salary.

"Can Blount County legally pay the increased salary?"

The Intermediate Court of Blount County, Alabama, was created by Act No. 494, General and Local Acts 1951, page 874. It is not a constitutional court. Therefore, the legislative power to create the court carried with it also the legislative power to abolish it. **Cherokee County v. Savage**, 249 Ala. 688, 32 So. 2d 803. The Legislature did abolish the said Intermediate Court by Act No. 600, Acts of 1953, approved September 15, 1953, and created in lieu thereof a court of record to be known as the Law and Equity Court of Blount County. When a court is abolished, any unexpired term of the judge thereof is abolished also, and the office of the judge of that particular court no longer exists.

The Law and Equity Court created in lieu of the Intermediate Court is an entirely new and different court, and the judge thereof is an entirely new and different officer.

The people of Blount County, through their chosen representatives in the law making body, having expressed the need to abolish the Intermediate Court and to create in lieu thereof a Law and Equity Court, all intendments must be resolved in favor of the validity of Act No. 600, supra, accomplishing this end. Good faith must be presumed. The Act, upon its face, shows substantial differences between the Intermediate Court and the Law and Equity Court created in lieu thereof. I cannot say, from an examination of Acts No. 494 and 600, supra, that the latter Act is but a colorable pretext and sham, which renders the court created thereby invalid under the authority of **Carnley v. Moore**, 218 Ala. 274, 118 So. 409. On the contrary, it is my opinion that the case of **Morgan County v. Edmonson**, 238 Ala. 522, 192 So. 274, is sufficient authority to uphold the validity of Act No. 600, supra. In addition to Section 68 and Section 281, Constitution of Alabama 1901, referred to in the **Morgan County** case, supra, the reasoning thereof is also applicable to the constitutional amendment proposed by Act (Joint Resolution) No. 748, General and Local Acts

1951, page 1297, which became effective May 16, 1952. In the **Morgan County** case, supra, our Supreme Court held at follows:

"Nor do the provisions of section 68 and 281 of our Constitution stand in the way of the validity of the Act. These sections presuppose the existence of an offfice at the time of the change in the matter of compensation of the incumbent, and its continued existence. Of course, as previously observed, and as held in Carnley v. Moore, supra, if the act evinces upon its face a lack of good faith, and that it is but an attempt to evade the Constitution it must fall. But here we have said the Act upon its face in good faith establishes a new county organization, and the local Act of 1919 is expressly repealed.

"True, the new act names as the four members of the new board for the four newly established districts, those persons who were duly elected members of the board created by the Act of 1919. But this fact is a mere incident. The office these members held under the local Act of 1919 has been abolished, and of consequence they could no longer be incumbents thereof. The Legislature could have named others, and the members of the abolished board could offer no just complaint. The mere fact, therefore, that these members of the abolished board were named to the new does not suffice to bring into play either section 68 or 281 of the Constitution."

It follows, therefore, that the salary of the judge of the Law and Equity Court created by Act No. 600, supra, is the salary for that office fixed by said Act. There is no increase in salary of the judge of the Intermediate Court of Blount County, for that office has been abolished. The salary now provided by law for the judge of the Law and Equity Court is, as pointed out above, an entirely new and different salary provided for the judge of an entirely new and different court, which I have said, in my opinion, was validly created by Act No. 600, supra.

Yours very truly,

SI GARRETT
Attorney General

October 19, 1953

Hon. Charles W. Terry,
State Personnel Director,
Montgomery, Alabama.

Merit System—Public Welfare—Officers and Offices.

The county director of public welfare is the appointing authority referred to in Title 55, Section 315, Code of Alabama 1940,

for the purpose of dismissing an employee of a county department of public welfare.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of October 2, 1953, is as follows:

"Your attention is called to Section 8 of Act 703, General and Local Acts of Alabama 1951, which provides in pertinent part as follows:

" 'The county director, subject to the approval of the county board and the provisions of the Merit System, shall appoint such staff as may be necessary to administer the welfare activities within the county. All administrative and executive duties and responsibilities of the county department shall be performed by the county director and must be in accordance with the rules and regulations of the state department, subject to the approval of the state board.'

"The director of the Tallapoosa County Department of Public Welfare has dismissed an employee of that department in the form required by Section 315, Title 55,Code of Alabama. An appeal to the State Personnel Board has been taken under the provisions of Section 315. It is alleged in the appeal that the Tallaposoa County Board of Public Welfare has declined to approve the dismissal of the employee, and the following appears in the minutes of a called meeting of the Tallapoosa County Welfare Board on September 23, 1953:

" 'Move made by Mr. Glenn and seconded by Mrs. Duffee that the Board refuses to approve the letter of dismissal of Mrs. Elizabeth Collier written and presented by Mrs. Katie Gross, the Director. The move was carried by a unanimous decision.'

"Your official opinion is therefore requested on the following question:

"Is the county director of public welfare the appointing authority referred to in Title 55, Section 315, Alabama Code, 1940, for the purpose of dismissing an employee of a county department of public welfare?"

Title 55, Section 315, Code of Alabama 1940, provides that "an appointing authority may dismiss a classified employee." Title 55, Section 294, Code of Alabama 1940, provides that " 'appointing authority' means the officer, board, commission, person, or group of persons having the power to make appointments to offices or positions of trust or employment in the State service." Section 8 of Act No. 703, General and Local Acts 1951, page 1211, which you cite, states that the "county director of public welfare . . . **shall appoint** such staff as may be necessary to administer the welfare activities within the county." (Emphasis added.) The county director shall appoint, however, "subject to the approval of the county board." "The question, therefore, is whether the county board of public welfare, by virtue of having the authority to approve appointments that are made

by the county director of public welfare under Section 8 of Act No. 703, supra, can be included in the definition of "appointing authority."

The official functions of the county boards of public welfare are specifically set out in Sections 7, 8, and 24 of Act. No. 703, supra. With respect to employment of personnel, the county board is authorized to do the following: The county board requests a roster from the State Personnel Department for first a local, and then a state-wide register for the position of county director. Then the county board, subject to the provisions of the merit system, is authorized to appoint a county director whose tenure is at the pleasure of the county board. Section 7, Act No. 703, supra.

With respect to other employees in the county department, the county board of public welfare, in conjunction with the State Department of Public Welfare, is authorized to determine the number of employees in the county department. In addition to having the authority to approve appointments of staff employees made by the county director, the county board is authorized to request a register of those eligible for various classified service positions from the State Personnel Department. Section 8, Act No. 703, supra.

However, none of these duties or responsibilities or powers include any function connected with the dismissal of an employee in the county department. The only power of appointment given the county board of public welfare is the power to appoint the county director. When the director is appointed and takes office, that director is vested with "all administrative and executive duties and responsibilities of the county department." Section 8, Act No. 703, supra. Appointment as well as dismissal is an executive duty. **Parsons v. United States,** 167 U.S. 324. In the absence of express statutory or constitutional provision to the contrary, the power to appoint carries with it as a necessary incident the power to remove. **Touart v. State, ex rel. Callaghan,** 173 Ala. 453, 56 So. 211.

It is clear that the words, "shall appoint" and "subject to the approval," have very different meanings. The words "shall appoint," when read as part of Section 9 of Act No. 703, supra, are clearly words conferring the power to perform the actual act of appointment. The words, "subject to the approval of," do not carry the same import. This is particularly apparent when the words are read in connection with Section 7 of Act No. 703, supra, which provide that "the county board, subject to the provisions of the Merit system, shall appoint a county director who shall be the executive officer of the county department." Thus, the board itself, by appointing the county director, makes it possible for the director to discharge the executive duty placed upon him of making staff appointments under the authority of Section 8 of Act. No. 703, supra.

The power and authority to approve an appointment does not carry with it, as a necessary incident, the power to remove, while the power to appoint does carry with it such right. **Parsons v. United States,** supra; **Jefferson County v. O'Gara,** 29 Ala. App. 281, 195 So. 267.

The power to appoint being in the county director alone, he, therefore, and no other, has the right to dissmis or remove an appointee, and he is the appointing authority referred to in Section 315, supra, for the purpose of dismissing an employee of a county department of public welfare.

Yours very truly,

SI GARRETT
Attorney General

October 28, 1953

Hon. T. C. Almon
Judge of Probate
Morgan County
Decatur, Alabama

Veterans—Exemptions—Licenses—Milk Control Board.

War veterans who meet all requirements of veterans business or occupational license exemption statutes may claim exemptions from payment of license fee levied by Act No. 893, General Acts 1953 (MS.), approved September 21, 1953, which levies a license fee upon retail stores selling milk in areas subject to jurisdiction of the Milk Control Board.

Opinion by Assistant Attorney General Miller.

Dear Sir:

Your request for an official opinion, bearing date of October 6, 1953, is as follows:

"Will you please advise me if a Veteran of Warld War I, War II, or Korean War, who otherwise qualifies would be entitled to an exemption for the milk license as provided for under Act 893 of the 1953 Legislature of Alabama.

"Since we are issuing these licenses every day, will you please give this your usual prompt attention."

The War veterans referred to in your inquiry may claim an exemption from the payment of the license fee levied under the provisions of Act No. 893, General Acts of 1953 (Ms.), approved September 21, 1953, provided such veterans meet all eilgibility requirements of the veterans exemption statutes.

Act No. 893, supra, levies a license fee of $2.50 per year upon persons subject to the jurisdiction of the Alabama State Milk Control Board who operate retail stores and buy, sell handle, or distribute milk therefrom, and

such license is levied upon each such store in addition to all other licenses or privilege taxes. This Act provides, among other things, that the license shall be obtained from, and the fee therefor paid to, the probate judge or other license collecting official or commissioner of the county in which the retail store is to be operated, the procedure for issuing such license, together with the procedure for transmitting the license fee to the Alabama State Milk Control Board. Section 7 of this Act provides that the provisions of Section 213, 214 and 215 of Title 22 of the Code of Alabama of 1940, which relates to "Stores," are expressly repealed.

Sections 213, 214 and 215, supra, relate to licenses which must be obtained from the Milk Control Board by persons subject to its jurisdiction who are defined by Section 206 of Title 22, supra, as "Stores," "Producers," "Producer-distributor," and "Distributor", and Section 215, supra, provides, among other things, that persons operating stores in areas in which the Milk Control Board exercises jurisdiction shall pay an annual license fee of $2.50. Comparing Act No. 893, supra, and Sections 213, 214 and 215 of Title 22, supra, it is apparent that the purpose of Act No. 893, supra, is to expressly provide and require that persons operating retail stores subject to the jurisdiction of the State Milk Control Board shall obtain the annual license from the probate judge, or other license collecting official or commissioner in the county where the store is located, instead of procuring such license from the Milk Control Board which was required prior to the enactment of Act No. 893, supra.

Section 852 of Title 51, Code of Alabama of 1940, as last amended by Act No. 233, General Acts of 1953 (Ms.), approved July 27, 1953, provides, in substance, that veterans of World War I, the Spanish American War, World War II, or those who served in the armed forces during hostilities with any foreign state, whether as a result of a declared war or not, who are disabled to the extent of 25 per cent of more, shall be exempt from business or occupational license taxes provided such veterans meet certain eligibility requirements and conditions specified in the exemption law. Act No. 353, General Acts 1945, page 570, as amended by Act No. 698, General Acts 1947, page 535, as further amended by Act. No. 229, General Acts 1953 (Ms.), approved July 24, 1953, provides, in substance, that veterans who have served 90 days or more in the armed forces of the United States during World War II, or at any subsequent time when the United States was, is, or shall be, engaged in hostilities with a foreign state, whether as a result of a declared war or not, shall be exempted from business or occupational license taxes for a specified period of time, provided such veterans meet certain eligibility requirements and conditions set forth in the exemption statute. It is noted that the two Acts of the Legislature of 1953 (Acts Nos. 229 and 233, supra,) which amend the above referred to war veterans' exemption statutes add or include veterans who have served in the armed forces "at any other time past, present or future, when the United States was, is, or shall be engaged in histilities with any foreign state, whether as a result of a declared war or not." It is my opinion that these amendments exempt veterans of the armed forces who have served during the period in which the United States was engaged in hos-

tilities in Korea, provided these veterans otherwise qualify for the exemption. In view of the above exemption statutes, the war veterans referred to in your inquiry are exempt from the payment of business or occupational license taxes within the several limitations prescribed by such statutes.

To answer your specific question, it must be determined whether the exemption from the payment of business or occupational license taxes given to war veterans under the provisions of the above mentioned exemption statutes exempt such veterans from the payment of the license fee levied under the provisions of Act No. 893, supra, relating to persons operating retail stores in areas subject to the jurisdiction of the Milk Control Board.

In an opinion of this office addressed to Honorable C. C. Horton, State Service Commissioner, Department of Veterans' Affairs, dated June 29, 1948 (Quarterly Report of the Attorney General, Vol. 51, page 233), it was held that veterans properly qualified under the law, who meet all eligibility requirements of the exemption statute, may claim the exemption from the payment of the license fee levied under Section 215, supra, upon a person defined therein as a "Producer" of milk, as such license fee is a levy upon the privilege of engaging in business as a milk producer.

Since the license fee levied under Act. No. 893, supra, upon persons operating retail stores selling milk is the same type of license fee which is levied upon producers of milk under Section 215, supra, such license fee being a levy upon the privilege of engaging in the business of buying, selling, handling or distributing milk at a retail store, it is my opinion, as stated at the outset, that the war veterans referred to in your inquiry, who meet all of the requirements of the veterans' exemption statutes, may claim an exemption from the payment of this license fee.

Very truly yours,

SI GARRETT
Attorney General

October 30, 1953

Hon. Joe D. McPherson
Deputy Superintendent of Insurance
Department of Insurance
CAPITOL

Insurance—Taxation.

The premium tax collectible under Title 28, Section 76, Code of Alabama 1940, is based on the gross premiums paid on the insurance placed at the time it is taken out with a foreign insurance company not authorized to do business in this state. An insured cannot take credit against the payment of the

premium tax of one policy on another policy on which taxes have been paid but which was cancelled before the expiration date thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of September 29, 1953, is as follows:

"We have a payment of premium taxes made in accordance with Title 28, Section 76 of the Alabama Code which provides for a 4% tax to be paid by the insured when business is placed with non-licensed companies. We have occasional requests to allow credit against another policy upon which taxes have been paid but the policy is cancelled before the expiration date. A typical example is in the request of the American Cast Iron Pipe Company, copy of which letter is attached herewith.

"Your opinion is requested as to whether or not an insured can take credit against the payment of premium tax of one policy on another policy which taxes have been paid but which was cancelled before expiration date."

In answer to your inquiry, it is my opinion that an insured cannot take credit against the payment of the premium tax of one poilcy on another policy on which taxes have been paid but which was canceled before the expiration date thereof.

Title 28, Section 76, Code of Alabama 1940, provides as follows:
"§76. Persons placing insurance with unlicensed foreign company must report to superintendent of insurance and pay tax on gross premium; penalty, etc.—Any person who may desire to place his insurance in foreign company not authorized to do business in this state may place such insurance, but the person placing such insurance shall at once make return of his action in this behalf to the superintendent of insurance, together with four per cent of the gross premiums paid on the insurance so placed, and it shall be lawful under such contracts of insurance for any person to adjust a loss under same. Any person failing to report such insurance placed by him in an unauthorized company, and make payment of the tax named, within thirty days after date of receiving policy, shall be required to pay a tax of eight per cent." (Emphasis supplied)

It will be noted that the tax in question is based on the gross premiums paid on the insurance placed at the time it is taken out with a foreign insurance company not authorized to do business in this state. In the case of **Sales-Davis Co. v. Henderson-Boyd Lumber Co.**, 193 Ala. 166, 69 So. 527, it was held that the object of this section was a collection of revenue on the gross premiums paid on the insurance as paid. See Quarterly Report of Attorney General, Vol. 14, page 74.

I am unable to find any provision of law authorizing a refund of this premium tax so paid, or any part thereof, in case of a cancellation of a policy before the expiration date. Also, there is no statutory authority allowing a credit against the payment of the premium tax in question due on a later or another policy in case of cancellation of the first policy before the expiration date.

Even if such a refund or credit were authorized, an offset against other taxes due the State would not be allowable in the absence of expressed statutory authority—Cf. Quarterly Report of Attorney General, Vol. 18, page 118; Quarterly Report of Attorney General, Vol. 15, page 48; **Shelton, Tax Collector vs. Blount County,** 202 Ala. 620, 81 So. 562.

Very truly yours,

SI GARRETT
Attorney General

October 30, 1953

Hon. C. C. (Jack) Owen, President
Alabama Public Service Commission
CAPITOL

Alabama Public Service Commission—Motor Carriers.

Lessor of motor vehicle equipment, who enters into bona fide lease, wherein lessee furnishes the driver, has direction and control of the vehicle and responsibility for its cargo, is responsible for payroll deductions, withholding taxes, tax assessments, premiums, and other payments by reason of the wages or earnings of the drivers, is not a contract carrier within the meaning of Section 1G of the Alabama Motor Carrier Act of 1939 (Act No. 669, General Acts 1939, page 1065, Title 48, Section 301 (1) (G), 1951 Cumulative Pocket Part, Code of Alabama 1940).

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of June 12, 1953, is as follows:

"Section 1, subsection G, of the 1939 motor carrier act describes a contract carrier as follows:

" 'The term "contract carrier by motor vehicle" means any person not included under paragraph F of this Section, who or which under a special or individual contract or agreement, under special or individual

contracts or special or individual agreements, and whether directly or by lease or any other arrangement transports passengers or property by motor vehicle for compensation in this State.'

"You will note in said definition the words 'by lease or any other arrangement.'

"We now have pending several cases where vehicles are owned by a person or company which holds no authority from this Commission whatsoever, but are being leased to a shipper who is using said vehicle as a private carrier under that part of Section 2, subsection A, third part, which reads:

" 'Motor vehicles while used in the transportation of property when the person furnishes the transportation is legally and regularly engaged in the business of selling such property;'

"The carriers who are now qualified with the Commission claim that the owner of those vehicles is a contract carrier under the definition and should qualify with the Commission.

"We would appreciate it very much if you would give us an official opinion from your office as to whether or not said vehicle owners should qualify with this Commission."

Your request involves the question of whether or not certain persons, carrying on the activities described below, are contract carriers within the meaning of Section 1G of the Alabama Motor Carrier Act of 1939 (Act No. 669, General Acts 1939, page 1064, Title 48, Section 301(1)(G), 1951 Cumulative Pocket Part, Code of Alabama 1940). Under Section 1G a contract carrier by motor vehicle is a person, not a common carrier, "who or which under a special or individual contract or agreement, under special or individual contracts or special or individual agreements, and whether directly or by lease or any other arrangement transports passengers or property by motor vehicle for compensation in this State."

You have enclosed facts concerning two "lessors" of motor vehicle equipment. Both lessors apparently lease motor vehicle equipment to shippers for use by those shippers in transporting their own products.

One of these lessors, Loftin, leases equipment on the following terms: The lessee furnishes the driver, the gas and the oil; the lessee changes the oil and greases the vehicle; the lessee maintains liability insurance and insurance for loss or damage of the cargo; and the vehicle are to be under the sole direction of the lessee, and are to haul only those materials to which the lessee has title. The lessor, Loftin, is paid twenty cents per load mile of operation, and is responsible for the tires and mechanical repairs.

The other lessor, Howard Truck Line, Inc., leases has direction and control of the vehicle and is responsible for the cargo; the lessee displays its own name on the vehicle as "operator"; the lessee employs competent drivers, and is responsible for payrolll deductions, withholding taxes, tax

assessments, premiums and any other payments due by reason of the wages or earnings of the drivers—including provisions for workmen's compensation insurance for the operators of this equipment. The lessor, Howard, pays road taxes due on account of the use of the vehicle; maintains, services and repairs the vehicle; and provides motor fuel, oil, tires and other devices needed on the vehicle.

On the assumption that these leases are bona fide and that their terms are fulfilled by the parties, and that the leases are not more subterfuges to enable the lessors to escape regulation by the Commission, neither Loftin nor Howard are "contract carriers" within the meaning of the motor carrier act. Both simply lease equipment for use by shippers, and neither maintains sufficient control and responsibility over the vehicles in the hands of the shippers to justify their being denominated contract carriers. The "control and responsibility" test has been laid down as the appropriate one by the United States Supreme Court. **Thomson v. U. S.,** 321 U. S. 19, 26 (1944).

While this question has not been determined by the Alabama courts, it has been the subject of litigation in the Federal courts and other state courts where similar acts have been construed.

Both the New York Public Service Commission and the New York Court of Appeals have held that a concern which leased trucks without drivers, or which was reimbursed for payment of drivers, in cases where it did furnish drivers, was neither a contract nor a common carrier with respect to such leases, within the meaning of a very similar provision of the New York act. **Motor Haulage Co. v. Maltbie,** 293 N. Y. 338, 57 N. E. 2d. 41. Also, in this case the lessor not only maintained and fueled the motor vehicle equipment, but also carried insurance covering personal injuries and property damage occurring in connection with the operation or use of the trucks.

The question of who furnishes the driver seems to have been a determinative one in the Federal decisions which have construed the Federal motor carrier act (49 U. S. C. A., Sections 301, et seq.). In **Georgia Truck System v. Interstate Commerce Commission,** 123 F. 2d. 210 (5th Cir, 1941), the court indicated that had the parties lived up to a contract whereby the lessees were to furnish the drivers of the vehicles, the lessor might not have been held to be a carrier. The court found, however, that actually the lessor furnished the drivers.

Similarly, in **Motor Haulage Co. v. U. S.,** 70 F. Supp. 17, 21 (E.D.N.Y. 1947), affirmed 331 U. S. 784, the court, in interpreting the Federal Motor Carrier Act, stated:

> "We emphasize that we are not speaking of cases where plaintiff merely furnishes the equipment, and the drivers are supplied by the shippers: the commission clearly decided that plaintiff was not a common carrier where such operations are concerned (46 M.C.C. 166). We are speaking of a case where the plaintiff furnishes not only the vehicle but the driver, is compensated, on a mileage or time basis,

pays the hire and other incidental expense of the driver, agrees to maintain the leased equipment in good order and repair, to carry insurance, and to garage and fuel the trucks. . . ."

A similar test has been laid down in **Interstate Commerce Commission v. F. & F. Truck Leasing Co.**, 78 F. Supp. 13 (D. Minn. 1948); **Empire Box Corp. v. Sulzberger Motor Co.**, 104 F. Supp. 762 (D.N.J. 1952); and in **Interstate Commerce Commission v. Isner**, 92 F. Supp. 582 (E.D. Mich. 1950). Cf. **Bridge Auto Renting Corp. v. Pedrick**, 174 F. 2d. 733, 737 (2nd Cir. 1949), holding that a trucking concern which leased trucks to customers, but provided no drivers, was not engaged in "transporting property for hire" within the meaning of the taxing statute found in 26 U. S. C. A., Section 3475.

A case seemingly contrary to the result reached herein is **Louisville Taxicab Co. v. Blanton**, 305 Ky. 178, 202 S. W. 2d. 433. In that case the lessors were held subject to the Kentucky regulatory act even though their lessees furnished the drivers, over whom the lessors had no control. But the relevant definition of a contract carrier in the Kentucky statute was broader than the definition in Section 1G of the Alabama Act. The Kentucky statute included persons who engage "in the business of leasing motor vehicles for a compensation for the transportation of persons or property upon the public highways." The court in the **Louisville Taxicab** case recognized the breadth of the Kentucky statute in distinguishing those cases which have held that owners of "U-Drive-It" cars are not carriers. (202 S. W. 2d. 433, 435). And see annotation on the subject of regulation of the business of renting motor vehicles without drivers in 7 A.L.R. 2d. 456-472.

Thus, on the facts concerning Loftin and Howard, it is my conclusion that their operations—leasing motor vehicles on the terms described—do not make them "contract carriers" within the meaning of Section 1G of the Alabama Motor Carrier Act of 1939.

Very truly yours,

SI GARRETT
Attorney General

November 3, 1953

Hon. T. B. Pearson
Superintendent of Education
Washington County
Chatom, Alabama

Schools—County Boards of Education—Libraries.

1. A county board of education may make an appropriation from its general funds to purchase jointly with another county equipment for a circulating library, which serves the public schools of both counties.

2. A county board of education cannot legally appropriate monies from its district school tax fund to purchase jointly with another county equipment for a circulating library, which serves the public schools of both counties.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of October 16, 1953, is as follows:

"In order to continue the operation of the Bookmobile Library Program in Washington and Clarke Counties, Alabama, it is necessary that a new truck and body be purchased for this service. The Counties of Washington and Clarke together with the State of Alabama under the Alabama Public Library Service will operate the Bookmobile unit and furnish all of the books to be distributed from this Bookmobile Library.

"This Bookmobile visits the various schools in Washington County and makes available to the students and teachers books from this service and from the Alabama Public Library Service in Montgomery, as well as making such books available to be borrowed by all persons in this county who desire to do so.

"The Court of County Commissioners of Washington County has agreed to make a substantial contribution toward the cost of purchasing the chassis and body for such Bookmobile, and it has been suggested that since this library service is an educational program and makes available books to the public schools, the students and teachers, that the County Board of Education should make a contribution toward the cost of the purchase of this truck and body to be used only for the purpose of the Bookmobile program in Washington and Clarke Counties. Clarke County, Alabama is contributing one-half the cost of this truck and body.

"Your official opinion is respectfully requested on the following questions:

"1. Could the Washington County Board of Education legally appropriate and pay from its General Funds whatever sum it feels necessary as a contribution toward the payment of the purchase price of the truck and body to be used for the Bookmobile unit as stated above?
"2. Could the Washington County Board of Education legally appropriate and pay from its District School Tax Fund whatever sum it feels necessary as a contribution toward the payment of the cost of the purchase price of the truck and body to be used for the Bookmobile unit as stated above?

"Your prompt attention to these questions will be very greatly appreciated in view of the fact that Clarke County's share of the cost of this truck and body and the State funds to be used for maintaining and operating this Bookmobile Library are being held in abeyance pending Washington County's share of such funds being made available."

In answer to your first inquiry, I am of the opinion that the Washington County Board of Education may legally appropriate and pay from its General Fund monies to be expended for the joint purchase of a truck and body to be used for the operation of the Bookmobile Library Program in Washington and Clarke Counties, Alabama. The equipment is to be purchased jointly, with each county contributing one-half the cost, and the Bookmobile is to be operated by Washington and Clarke Counties, together with the State of Alabama, under the Alabama Public Library Service.

Under the provisions of Title 52, Section 376, Code of Alabama 1940, county boards of education may appropriate funds to any public school under the control of the ocunty board of education for the purpose of establishing, maintaining, enlarging or improving public libraries, in such school. Section 380 of this Title authorizes appropriations to circulating libraries in lieu thereof.

An opinion of this office, construing the provisions of Section 376, supra, held that county boards of education may appropriate funds for the purchase of books to be used for a county circulating library. Quarterly Reports of Attorney General, Vol. 54, page 135. Therefore, it is my opinion that the appropriation, stated in your inquiry, which the Washington County Board of Education intends to make from its General Fund, would be well within the purpose and intent of Section 380, supra, and in harmony with Section 376, supra.

However, answer to your second inquiry must be in the negative. Title 52, Section 272, Code of Alabama 1940, provides as follows:

"The funds arising from levying a special tax for school purposes in any school tax district under the jurisdiction of the County Board of Education shall be used for the exclusive benefit of the public schools

of such district, provided, however, that in any school tax district where such tax is being levied there is no public school, the funds arising from levying said tax may be used for the purpose of transporting school children residing in such district to a school located in another district. In the case of cities and towns under independent boards said county tax collector shall collect said taxes and pay over the same to the treasurer of said city or town to be used for the exclusive benefit of the schools thereof in accordance with the law."

The Washington County Board of Education cannot legally appropriate and pay from its district school tax fund monies that will be used for purposes other than for the exclusive benefit of the public schools of that district. The sole exception to this rule is the provision concerning transportation of school children residing in a district in which no public school is located. Quarterly Report of Attorney General, Vol. 19, page 184; **City Board of Education v. Williams,** 231 Ala. 137, 163 So. 802. It logically follows that an appropriation from this fund by the Washington County Board of Education to purchase equipment for a circulating library that will serve and benefit the county of Clarke would be prohibited.

Yours very truly,

SI GARRETT
Attorney General

November 3, 1953

Hon. Julian Swift
Clerk of the Circuit Court
Jefferson County
Birmingham, Alabama

Bankruptcy—Costs and Fees—Executions.

The discharge in bankruptcy of provable costs does not ipso facto bar the issuance of execution for such costs.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of May 12, 1953, is as follows:

"I will greatly appreciate an opinion as to whether or not bankruptcy of a judgment debtor defendant before execution against said defendant prevents the issuance of execution, thereby preventing a return of no property found, which is a condition precedent to the statutory

execution against the plaintiff for his cost. That is to say, would a petition and discharge in bankruptcy of an unsuccessful defendant forever prevent an execution against a successful plaintiff by reason of the inability to obtain a valid return of no property found against the bankrupt."

In my opinion the discharge in bankruptcy as to provable costs does not in and of itself bar the issuance of execution for such costs.

". . . 'A discharge in bankruptcy releases the bankrupt from the obligation of a debt, not in the sense that the debt is paid or satisfied, but only that there is afforded the debtor a complete legal defense to an action on the debt if he chooses to avail himself of it. . . .'" (**First National Bank of Dozier v. Henderson**, 243 Ala. 636, 11 So. 2d. 366, quoting 6 Am. Juris., p. 802, and citing **Covington, et al. v. Robinson**, 242 Ala. 337, 6 So. 2d. 421, 423.)

It is my conclusion that an execution for costs against an unsuccessful defendant may be issued after his discharge in bankruptcy, subject to his plea of discharge and motion to quash. If no such action is taken by the defendant, then levy could be made, or the execution returned "No Property Found," whichever the circumstances direct.

In my opinion, the only thing which would absolutely prohibit the eventual issuance of execution against the defendant would be a permanent stay by the court in which the costs were incurred. **Hamilton v. First State Bank of Garrison**, 220 N. W. 644, 12 Am. Bankr. Rep. N. S. 393, 57 N. D. 143. A final adjudication and discharge would remove the matter from the jurisdiction of the court of bankruptcy. **In re Havens**, 272 F. 975.

As a practical matter, in a great majority of the cases, there would be no property belonging to the defendant upon which levy could be made; therefore, the defendant would have no necessity for pleading his discharge. The execution would then be returned "No Property Found" and statutory execution could be issued against the plaintiff.

Yours very truly,

SI GARRETT
Attorney General

November 4, 1953

Hon. Bradley Brown, Director
Department of Revenue
Jefferson County
Birmingham, Alabama

Licenses—License Tags—Motor Vehicles.

1. The three dollar tag under Act No. 775, General Acts 1953, approved September 19, 1953, follows the vehicle for the duration of the fiscal year for which it was issued, and is properly transfer-

able with the vehicle, regardless of whether or not the transferee can qualify for the three dollar tag under said act.

2. The three dollar tag follows the vehicle for which it was purchased for the duration of the fiscal year. The fact that the owner of such vehicle later in the same year acquires another vehicle or vehicles would not alter this rule or invalidate the three dollar tag on the first vehicle.

3. Where a person owns two "pick-up trucks," or more than one means of transportation, he will not be qualified to purchase the three dollar tag for a pick-up truck under Act No. 775, supra.

4. The term "pick-up truck" as is defined in said Act contemplates a "box or express type body" of three-fourths of a ton capacity or less, and does not include a "panel body" or "stake body" truck, even though such trucks have a capacity of less than three-fourths of a ton.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of October 9, 1953, is as follows:

"This office is being confronted with many questions and problems regarding the proper interpretation of Act No. 775 approved September 19, 1953, Regular Session of the Legislature of 1953, relating to the proper handling of the three dollar 'pick-up' truck tags. Because we are now in the process of issuing these tags, I would appreciate your handling this request for an official opinion at the earliest possible moment.

"1. Suppose a person has properly procured a tag for a pick-up truck for three dollars and that at a later date he trades this truck to a dealer. Is the three dollar tag issued to the original owner transferable to the new owner (a) if such owner has in his household other means of transportation or (b) if such new owner has no other means of transportation.

"2. If a person procures the three dollar tag properly and is entitled to it at the time such tag is procured and later during the current year he buys another vehicle, would he have to pay the difference on the tag or would the tag be invalid?

"3. Would a person who owns two pick-up trucks be entitled to the three dollar tag on one or both of said trucks?

"4. As used in Act No. 775 the term 'pick-up' is not expressly defined. Is this three dollar tag, presuming the owner is properly qualified to get one, limited to what is commonly known as a pick-up truck, or

can such three dollar tag be extended to a person properly qualified whose truck is a panel body or stake body, or any other truck of less than ¾ tons?

"Let me reiterate that I shall be most gratefull if you will favor us with this opinion at the earliest possible moment."

For the sake of clarity my answers to your questions will be given the same numbers, or sub-numbers, as those which have been used by you. Your questions are answered in this order as follows:

In answering your question 1(a), it will first be necessary to look to the nature of the licenses on motor vehicles. Motor vehicle licenses, unlike privilege and occupational licenses, which are personal privileges, attach to the motor vehicle for which the license tag is purchased. Title 51, Section 697, Code of Alabama 1940, provides that **"for each motor truck** the following license based on the manufacturer's rated capacity stamped on the truck shall be charged." (Emphasis supplied.)

Title 51, Section 693, Code of Alabama 1940, as amended by Act No. 206, General and Local Acts 1951, page 468, which relates to the license on private automobiles, provides: "The following license and registration fee shall be charged **on automobiles and motor cars** kept for private use: . . . "(Emphasis supplied.) The motor vehicle license laws follow this same scheme throughout; that is, the license is directed at the motor vehicle.

In this respect Title 51, Section 706, Code of Alabama 1940, as amended by Act No. 361, General Acts 1945, page 578, provides in pertinent part as follows:

"When **proper** motor vehicle license tags shall have been bought **for the current tax year** for a motor vehicle and such motor vehicle shall have been sold or transferred to a new owner or to new owners, either once or successively, such motor vehicle license tags shall remain on **such motor vehicle in the hands of the new owner or successive owners for the balance of the tax year . . .** " (Emphasis supplied.)

The provisions of Act No. 775, General Acts 1953, approved September 19, 1953, do not change the status of the license as is so applied in the sections hereinabove referred to, but serve to emphasize the fact that the license is on the motor vehicle for which the tag is purchased.

Therefore, the answer to your question 1(a) is in the affirmative. If the first owner of the vehicle properly qualifies for the three dollar tag under the terms of the Act, and the vehicle involved was a "pick-up truck" as defined therein, then a "proper motor vehicle license" tag was bought for the current year, and, although transferred to another owner or owners, the license tag would follow such vehiclle and still be good for the entire year, even though the person or persons to whom the vehicle was transferred could not have qualified or made the required affidavit under the law.

The reasoning used in answering 1(a) is equally applicable to 1(b). If a proper tag has been issued in the first place to a qualified owner of the vehicle, the tag would follow the vehicle and would be good for the current year in which issued, regardless of the fact that the status of the owner changed during said year. Therefore, the answer to 1(b) is also in the affirmative.

Your question No. 2 appears also to be answered in part by 1(a). Where the three dollar tag is purchased by a qualified applicant in the first instance, then such tag follows the truck and is good for the entire year. Thus, the three dollar tag will remain with the pick-up truck whether such truck was transferred by the owner or not during the fiscal year. If the owner buys another vehicle during the year, then this would not invalidate the three dollar tag or change the status thereof on the pick-up truck for which it was purchased.

In answering your question No. 3, let us look again to the provisions of Act No. 775, supra, insofar as they relate to the person eligible to purchase the license tag before a license tag has been issued for the particular pick-up truck involved for the current year. The provision contained in the Act has the following provisions in this respect:

> "Provided, however, any applicant for such motor vehicle license shall, upon making application for same, execute, under oath, a statement in writing to the officer issuing such license reciting that such applicant is the owner of the vehicle and that such vehicle is the only mode or method of transportation owned by the applicant or available for his use in the household in which the applicant resides." (Emphasis supplied.)

Under the very terms of the law itself, the three dollar tag is confined to a pick-up truck which is the only mode or method of transportation owned by the applicant or available for his use in the household in which he resides. This seems to clearly indicate that only one pick-up truck is contemplated and that if the applicant for a three dollar tag owns or has available for his use in the household in which he resides another pick-up truck or any other means of transportation, then he would not be eligible for the three dollar tag on any of his pick-up trucks. The answer to your third question is that the applicant would not, under the circumstances, be qualified for the three dollar tag on either pick-up truck.

The Act very clearly defines pick-up trucks as "trucks which have a box or express type body of three-fourths of a ton capacity or less, and commonly known as 'pick-ups' or 'pick-up trucks.' "

What is commonly known as a "pick-up truck" is a small truck which is constructed and intended to convey only light loads. Words and Phrases, Permanent Edition, Volulme 42A, pp. 250 and 251.

Information which I have received from reliable automobile dealers and which is taken from the manufacturers' classifications is to the effect

that a "box or express type body" is one and the same thing, and that such body type is the type commonly used on pick-up trucks. This being considered, my answer to your question No. 4 is in the negative. The Act itself confines the "pick-ups" or "pick-up trucks" to those having a box or express type body. It is my opinion that the Act would not include trucks having a panel body or stake body, even though such trucks have a capacity of three-fourths of a ton or less.

Yours very truly,

SI GARRETT
Attorney General

November 9, 1953

Hon. H. G. Greer, Superintendent
Monroe County Schools
Monroevillle, Alabama

Schools—Oils—Leases.

Whille lands conveyed under Act No. 187, General Acts 1919, page 187, to the State of Alabama for public school purposes revert to the original grantors, or their heirs, when such lands are permanently abandoned for such purposes, the leasing of oil, gas, and mineral rights does not constitute such an abandonment.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of May 18, 1953, is as follows:

"An oil company desires to lease the oil rights on the Bethlehem School property in Monroe County, Alabama. The land in question is deeded to the State for school purposes. Under the long range plan of the County Board of Education and the State of Alabama, the Bethlehem School will be consolidated with the Beatrice School. It is our understanding that the school property in question will revert to the original donors when the school is abandoned. Due to the rapid decline in school population in the Bethlehem area, it is the opinion of our Board that the school in this community will be consolidated within a period of five or six years.

"In view of the above statement of facts, our Board would like to know what procedure would have to be followed in the matter of leasing the oil rights on the above school property."

I am advised by the State Department of Education that the so-called "Bethlehem School property" consists of that certain tract of land conveyed to the State of Alabama by warranty deed excuted on June 27, 1921, by Leonard Evers and wife, Minnie Evers, the said deed being received and recorded on August 25, 1921, in Vol. 90, at page 17, in the Probate Office of Monroe County. That deed shows that the land was conveyed in consideratioon of the erection or repair of a rural school, and that the conveyance was made for the benefit of School District No. 41 of Monroe County, Alabama. The tract conveyed consisted of 5½ acres of land, more or less.

Prior to the aforesaid conveyance, there had been enacted by the Legislature of Alabama, Act No. 187, General Acts 1919, page 187, the effective date of which was July 28, 1919. That act provided for the reversion of the title to lands donated to the State as a site for rural schools, when such schools are permanently abandoned. The conveyance in question was, therefore, made sbuject to the existing law, and, should the property be permanently abandoned for school purposes, title thereto will revert to the original grantors, or their heirs. See Quarterly Report of Attorney General, Vol. 6, page 54.

You state that the county board of education is of the opinion, from present indications, that within the next five or six years the Bethlehem and Beatrice schools will be consolidated, and that the Bethlehem property will be abandoned (permanently, I assume) for school purposes. While, in my opinion, a reversion will occur in the event of permanent abandonment for school purposes, I see no legal objection to the leasing of the oil, gas, and mineral rights in the meanwhile, pursuant to the provisions of Act No. 639, General and Local Acts 1951, page 1094 (see Title 47, Section 55, 1951 Cumulative Pocket Part, Code of Alabama 1940), subject to reversion when the propetry is permanently abandonment for school purposes. Such a lease would not constitute a permanent abandonment for school purposes. Dees, et al. v. Cheuvronts, et al., 240 I11. 486, 88 N. E. 1011.

This office has held that the sale of merchantable timber, on lands deeded to the State for public school purposes under Act No. 187, supra, is not a permanent abandonment of the property for ppublic school purposes so as to effectuate a reversion to the original grantors. Quarterly Report of Attorney General, Vol. 51, page 155.

In conclusion, I state that the foregoing is merely an expression of the opinion of this office on the question presented, and in no event should it be considered as a judicial determination of the title involved.

Very truly yours,

SI GARRETT
Attorney General

November 10, 1953

Hon. J. H. Tranum, Chairman
Board of Directors
Conecuh County

Department of Roads and Bridges
Evergreen, Alabama

Counties — Conecuh County — Gasoline—Gasoline Fund — Roads and Bridges—Road and Bridge Fund — Constitutional Amendments.

A portion of the salaries of members of Conecuh County governing body may be paid from the gasoline tax fund and the public highway and traffic control fund, with the exception indicated, provided this portion of the salaries has a reasonable relation to the amount of time spent by the members in supervising highways, roads and bridges as against time spent performing other duties. No road and bridge fund money may be used to compensate these members.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of June 29, 1953, is as follows:

"The governing body of Conecuh County, Alabama is the Board of Directors of Conecuh County, and I am the Chairman thereof. As such Chairman of the Board of Directors, I am requesting an opinion regarding the expenditures of the Public Highway and Traffic Fund.

"Conecuh County is operating under a local act, being Act No. 177, appearing in Local Acts of the Legislature 1945, at page 91. Under Section 9 of said Act, the Board members are paid either in whole or in part out of the county road and bridge fund, the county general fund or the county gasoline tax fund. Under Section 11, the said Board supervises all highways, roads and bridges in Conecuh County.

"Since the adoption of Amendment No. I on the ballot of November 4, 1952, proclaimed ratified November 19, 1952, all revenue accruing to the county from motor vehicle license tax, driver's license and learner's license and learner's permits are deposited in the Public Highway and Traffic Fund.

"I request an opinion of you as to whether the members of the Conecuh County Board of Directors could be paid their salaries out of the Public Highway and Traffic Fund."

Your request concerns the proper payment of members of the Board of Directors of Conecuh County—the governing body of that county. Under Section 9 of Act No. 177, Local Acts 1945, pages 91, 94, compensation for the members of this board is by annual salary of $2400.00. Section 9 also provides that the salary shall be in lieu of other compensation, "including all per diem, mileage, expenses or fees." Section 9 sets out that salaries "may be paid, either in whole or in part, out of the county road and bridge fund, the county general fund or the county gasoline tax fund, or by apportionment among said funds, as the board may from time to time determine."

Obviously, duties for which members of the Board are compensated include all functions of their office. Therefore, the use of monies from the road and bridge fund for such compensation would violate Section 215, Constitution of Alabama 1901, since monies levied pursuant to Section 215 would not be used exclusively for the erection, construction or maintenance of necessary public buildings, bridges or roads. Quarterly Report of Attorney General, Vol 70, page 35.

So far as gasoline tax monies are concerned, your local act would normally allow use of these funds for compensation of members of the Board, despite the provisions of Title 51, Section 647, Code of Alabama 1940, as last amended by Act No. 649, General and Local Acts 1949, page 998, which allows only the payment of per diem and mileage to members of a county governing body when engaged in supervising the construction, improvement and maintenance of highways, bridges and streets. See Quarterly Report of Attorney General, Vol. 70, page 35, supra. This is so, even though your local act abolishes per diem payment.

But, there should be a limitation on the use of such gasoline tax funds. They should be expended for salaries in a proportion which has a reasonable relation to the amount of time spent by members of the Board in supervising highways, roads and bridges, as against time spent on their other duties.

The remaining question is whether or not the constitutional amendment proposed by Act No. 755, General and Local Acts 1951, page 1305, submitted November 4, 1952, and proclaimed ratified November 19, 1952, (a) prevents the use of gasoline tax funds in a proportion described in the above paragraph, or (b) prevents the use of funds deposited in the "public highway and traffic control fund" (not previously earmarked solely for traffic control) in this proportion. It would appear that since the constitutional amendment itself allows the use of such monies for the "cost of construction, reconstruction, maintenance and repair of public highways and bridges . . . the cost of traffic regulation, and the expense of enforcing state traffic and motor vehicle laws," such disposition of these funds in the proportion outlined above is allowable.

Such a scheme is within the import of Act No. 880, Acts of Alabama 1953, approved September 19, 1953 (Ms.). This act allows payment "out of the county gasoline tax revenues" of per diem and mileage of members

of county governing bodies supervising the county roads and bridges. Since salaries under your local act are paid in lieu of such per diem and mileage, a proper proportion of such salary outlined above may be paid out of the county gasoline tax fund or the public highway and traffic control fund, so long as no monies in the fund earmarked solely for traffic control are used.

Very truly yours,

SI GARRETT
Attorney General

November 10, 1953

Hon. H. A. Longshore
Superintendent of Insurance
Department of Insurance
Montgomery 4, Alabama

Insurance—Licenses.

Mutual insurance company, which was converted from a fraternal organization prior to 1952, but licensed to do business in Alabama as a mutual company after 1952, must pay gross premium license tax based on all premiums collected in Alabama—including premiums from policies issued when the company was a fraternal organization.

Opinion by Assistant General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of May 13, 1953, is as follows:

"We have had before this Department a problem of the collection of premium taxes from the Security Benefit Life Insurance Company of Topeka, Kansas. This company was admitted to Alabama in December, 1952 as a mutual life insurance company. The company had been converted several years before from a fraternal organization to a mutual insurance company. During the year 1952 the company collected in Alabama premiums from policy holders who had taken the policies out when the company was licensed as a fraternal organization in other states. They have never been licensed as a fraternal organization in Alabama. The company has been called on to pay premium taxes on the entire premiums in Alabama, including the premiums on the old fraternal policies. The company contends that they owe tax only

on business written after they became a mutual life insurance company. We are attaching herewith a copy of a letter from the company stating their position in the matter.

"Your opinion is requested as to whether or not the Security Benefit Life Insurance Company may be taxed for the total premiums collected in Alabama or only on business written after they were converted to a mutual company."

Under the facts stated in your request, Security Benefit Life Insurance Company (hereafter called "Security") at one time was licensed in other states to do business as a fraternal organization. However, several years before 1952, Security was converted into a mutual insurance company. In 1952, Security for the first time was licensed to do business in Alabama as a mutual life insurance company, and at no time has Security ever been licensed to do business in Alabama as a fraternal organization.

On these facts I conclude that Security must pay the license imposed by Title 51, Sections 812-829, Code of Alabama 1940, as amended, and more particularly, Section 816, as amended by Act No. 156, General Acts 1945, page 196, a license imposed on gross premiums received by Security for business done in Alabama. Included in gross premiums are all premiums collected for business done in Alabama—whether or not some premiums have been paid on poilcies taken out when Security was a fraternal organization.

"Insurance companies" are defined in Section 812, supra, as including mutual companies, but not including fraternal benefit societies or associations as defined in Title 28, Section 167, Code of Alabama 1940. Section 816, as amended, supra, imposes the premium tax on foreign insurance companies. Security has cited to you certain cases holding that where a foreign insurance company has originally done business in a state as a fraternal organization, exempt from license fee under the relevant statute, and later converts to a non-exempt company, the license imposed by the state on premiums should be measured by only those premiums collected from policies written after such conversion. See, e. g., **Yeomen Mutual Life Ins. Co. v. Murphy,** 223 Iowa 1315, 275 N. W. 127; **United Mutual Life Ins. Co .v. State,** 194 Ark. 371, 108 S. W. 2d 484; **Criner v. American Mutual Life Ins. Co.,** (Mo.) 163 S. W. 2d. 797; **Lockhart v. American United Life Ins. Co.** (Tex. Civ. App.), 181 S W. 2d. 607.

However, a more persuasive case is **Lutheran Mutual Life Ins. Co. v. State,** 242 Wis. 598, 9 N. W. 2d. 82. There, under similar facts, Wisconsin measured the gross premium tax by premiums on all ploicies, including those written in Wisconsin when the converted company was doing business there as an exempt fraternal society. The court reasoned (9 N. W. 2d. at 87):

"Wisconsin has the right to determine the conditions under which it will permit foreign insurance companies to do business in this state.

It may impose such restrictions or conditions as it sees fit as a prerequisite to permitting them to do business in this state."

Actually, the situation presented in your request is a much stronger one for imposing the premium tax on all premiums collected in Alabama, since Security has never been licensed to do business in Alabama as a fraternal organization. Security cannot, therefore, make the argument that as to some of its policies, it had been authorized to do business as an exempt company and should be allowed to continue to do so.

For the reasons set out above, Security must pay the tax imposed by Section 816, as amended, supra, on all premiums received from business done in Alabama—including premiums on policies written when Security was a fraternal society.

Very truly yours,

SI GARRETT
Attorney General

November 12, 1953

Hon. C. L. Beard, President
Board of Commissioners
Colbert County
Sheffield, Alabama

Merit System—Municipalities—Officers and Offices—Vacancies.

1. A member of the Civil Service Board of Sheffield holds office, after the expiration of his term, until his successor is duly appointed and qualified, provided that he may not hold said office beyond a reasonable time.

2. A member of the Civil Service Board of Sheffield may be appointed only by the method provided for in the Act creating said board.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of October 23, 1953, is as follows:

"I wish to request your opinion on the matters set out herein.
"By an Act of the Legislature approved August 2, 1949, (Alabama Acts of 1949, page 460) the Legislature of Alabama set up a civil service system for the City of Sheffield and created The Civil Service Board of Sheffield. In compliance with the act, the Board of Commissioners of the City of Sheffield appointed three members of the Civil Service Board to serve for respective terms of one, two and three years. The

term of the member appointed to serve for one year expired, and on September 30, 1949, this member was reappointed to serve for a term of three years and his term has now expired.

"The Act, Section 4, provides that all appointments to the Civil Service Board shall be by unanimous vote of the governing body of the City of Sheffield. The members of the Board of Commissioners of the city have been unable to agree upon an appointment to fill the place of the member whose term expired on September 30, 1953.

"In this situation I will appreciate it if you will give me your opinion on the following question:

"1. Does a member whose term expired on September 30, 1953, hold over until his successor is appointed and qualified?

"2. If you answer the above question in the negative, please advise as to whether such member holds over for any length of time, and if so, for what length of time.

"3. If the said member does not hold over and no appointment is made to fill his place can the Civil Service Board operate as a two man board?

"4. Is there any way, under the present law, by which an appointment to fill this place can be made by resort to the courts or otherwise other than by unanimous vote of the governing body of the city?"

The general rule of law is that in the absence of statutory or constitutional regulation the incumbent of a public office may hold said office until someone else is elected and qualified to assume the office. **Mechem on Public Officers and Offices**, p. 257, Section 397; 43 Am. Jur., Public Officers, Section 162. There is no such statutory or constitutional regulation pertaining to the office under consideration.

However, Alabama qualifies the above rule to the extent that, in this state, a public officer may only hold his office for a "reasonable time" after the expiration of his term. Opinion to Honorable J. E. Putman, City Clerk of Phenix City, Phenix City, Alabama under date of August 26, 1953 (Ms.).

"Reasonable time" is a relative and flexible term which cannot be defined by any prescribed rule, and the meaning of which in a particular case depends upon the surrounding circumstances. **Dockter v. Sheridan County**, 72 N. D. 607, 10 N. W. 2d, 485. What is a "reasonable time," is a question to be decided by the courts in each case. **Burton v. Stevenson**, 206 Ala. 508, 91 So. 74. I am of the opinion that the member of your board whose term expired on September 30, 1953, has not held his office beyond a "reasonable time" to date. However, he cannot hold this office indefinitely.

Therefore, I am of the opinion that a member of the Civil Service Board of Sheffield holds his office, after the expiration of his term, until

his successor is duly appointed and qualified, provided that his successor qualifies as a member of said board within a "reasonable time."

Since I am of the opinion, as shown by the above discussion, that the Civil Service Board of Sheffield is at present composed of two members whose terms have not expired, and one member who is holding over for a reasonable time, on answer to your question as to whether said board can operate as a two man board is unnecessary.

The last sentence of Section 4 of Act No. 321, General and Local Acts 1949, page 460, reads as follows:

"All appointments to the board shall be by unanimous vote of the governing body of the City."

The only provision, under our general law, for filling vacancies in municipal offices is Title 41, Section 177, Code of Alabma 1940. This statute provides that the Governor of Alabama may appoint a qualified person to fill vacancies in such offices where "there is no way provided by law for the filing of such office."

Since Section 4 of Act No. 321, supra, clearly provides a method of filling vacancies on the board, I am of the opinion that there is no way to fill such vacancies other than by unanimous vote of the governing body of the city. Cf. White et al. v. Powell et al. 246 Ala. 356, 20 So. 2d, 467.

Yours very truly,

SI GARRETT
Attorney General

November 13, 1953

Mrs. Gladys Clark
Clerk-Register
Coffee County Circuit Court
Elba, Alabama

Costs and Fees—Rewards—Alabama Alcoholic Beverage Control Board—Probation—Intoxicating Liquors.

1. Act. No. 699, General Acts 1953 (Ms.), approved September 17, 1953, amending Title 29, Section 102, Code of Alabama 1940, requires the Alabama Alcoholic Beverage Control Board to pay the sum of fifty dollars when a person is convicted for unlawful distilling or manufacturing prohibited liquors.

2. The item of fifty dollars required to be paid by the Alabama Alcoholic Beverage Control Board, under the provisions of Section 102, as amended, supra, is not an item of cost and

should not appear in the cost bill, but is simply a charge against the Alabama Alcoholic Beverage Control Board.

3. In fixing the terms of probation, a court may require a probationer to pay costs but such requirement does not include item of fifty dollars required to be paid by the Alabama Alcoholic Beverage Control Board under the provisions of Section 102, as amended, supra.

4. A condition of probation requiring probationer to reimburse the Alabama Alcoholic Beverage Control Board in amount of fifty dollars paid by said Board under the provisions of Section 102, as amended, supra, is a matter of judicial discretion, not determinabel by an opinion of the Attoreny General.

5. Section 102, as amended, supra, requiring the Alabama Alcoholic Beverage Control Board to pay fifty dollars under certain conditions, is applicable to convictions on and after efefctive date of act amending Section 102, supra, September 17, 1953.

Opinion by Assistant Attorney General Sykes.

Dear Madam:

Your request for an official opinion, bearing date of October 21, 1953, is as follows:

"ACT NO. 699—Approved 17 September, 1953.

"The above Act, in part, reads as follows:

" 'Section 1. That Section 102, Title 29, Code of Alabama, 1940, be and is hereby amended to read as follows:

" 'Section 102. Whenever any person is convicted in the circuit court of unlawfully distilling, or manfacturing or making any of the prohibited liquors or beverages as defined by this title, there shall be charged to the Alabama Alcoholic Beverage Control Board to be paid by them the sum of fifty dollars out of the funds used by the Board for the purchase of alcoholic beverages, to be allowed the sheriff or other officer or person who furnished the evidence and brought about the conviction, and who shall satisfy the presiding judge that he is the person entitled to said sum, and shall receive from the judge a certificate to that effect.'

"1. Does this mean that regardless of how the other items of costs are taxed by the Court that the $50.00 referred to in this Act must be paid by the Alabama Alcoholic Beverage Control Board?

"For instance, if a defendant should be convicted and apply for probation and the court put him on probation conditioned that he pay

the cost incurred in the case, then would the $50.00 referred to here still be paid by the Alcoholic Beverage Control Board, and the defendant be relieved of paying this particular item of cost?

"2. Would this Act (699) apply to cases in which indictments were returned prior to its passage, 17 September, 1953?

"An early reply to these questions would be appreciated, as we have terms of Criminal Court starting in Coffee County on 9th November, 1953."

The first part of your inquiry No. 1 is answered by an informal opinion of this office rendered under date of October 15, 1953, to Hon. John Mathews, Clerk of the Circuit Court of Montgomery County. Our opinion concerning this question is as follows:

"In your telephone call to me today you referred to Act. No. 699, General Acts 1954 (Ms.), approved September 17, 1953. This act amends Title 29, Section 102, Code of Alabama 1940, to read as follows:

" 'Section 102. Whenever any person is convicted in the circuit court of unlawfully distilling or manufacturing or making any of the prohibited liquors or beverages as defined by this title, there shall be charged to the Alabama Alcoholic Beverage Control Booard to be paid by them the sum of fifty dollars out of the funds used by the Board for the purchase of alcoholic beverages, to be allowed the sheriff or other officer or person who furnished the evidence and brought about the conviction, and who shall satisfy the presiding judge that he is the person entitled to said sum, and shall receive from the judge a certificate to that effect.'

"You have asked this office whether or not the sum of fifty dollars should be included in the cost bill submitted to the Department of Corrections and Institutions, and, if not, in what manner should the sum of fifty dollars to be collected from the Alabama Alcoholic Beverage Control Board.

"In my opinion the fifty dollar fee or reward provided for by Title 29, Section 102, Code, as amended, supra, should not, after the effective date of Act No. 699, supra (September 17, 1953), be included in the cost bill submitted to the department of Corrections and Institutions. You will note that the phrase appearing in Section 102, supra, before amendment, to the effect that 'there shall be charged in the bill of costs to be paid and collected as other items of costs' the sum of fifty dollars has been deleted and there now appears in place thereof, 'there shall be charged to the Alabama Alcoholic Beverage Control Board to be paid by them' the sum of fifty dollars out of the funts used by the Board for the purchase of alcoholic beverages.

"In my opinion the Circuit Court now has no authority to include this item of fifty dollars in the cost bill.

"This amount should be collected by the Clerk directly from the Alabama Alcoholic Beverage Control Board. I suggest, therefore, that

you, as Clerk of the Circuit Court, should send a bill or claim to the Alabama Alcoholic Beverage Control Board in substantially the following form:

" 'To the Administrator of the Alabama Alcoholic Beverage Control Board, Montgomery, Alabama:

" 'The following named person was convicted in the Circuit Court of .....County for the offense of unlawfully distilling or manufacturing or making prohibited liquors or beverages as defined by Title 29, Code of Alabama 1940, on the following date:

" 'Name of Defendant	Date of Conviction	Offense	No. of Case
" 'John Doe	Oct. 1, 1953	Distilling	13720

" 'In said case, or cases, the sheriff (here list the name of the sheriff), or other officer or person (here list the name of other officer or person) has satisfied the presiding judge of said court that he furnished the evidence and brought about the conviction of said defendant and further that he is the person entitled to the fee or reward of fifty dollars provided for by Title 29, Section 102, Code of Alabama 1940, as amended by Act No. 699, General Acts 1953, approved September 17, 1953. The said person has received a certificate, which is hereto attached, from the judge of said court to the effect that he is entitled to the said fee or reward.

" 'The amount of said fee or reward in the amount of fifty dollars should be remitted to the Clerk of this Court for distribution to the sheriff (or other officer or person) under the provisions of said Act No. 699, supra, and should be paid from the funds of the Alabama Alcoholic Beverage Control Board out of funds used by the Board for the purchase of alcoholic beverages.

" 'STATE OF ALABAMA)
" 'MONTGOMERY COUNTY)

" 'I, John Mathews, as Clerk of the Circuit Court of Montgomery County, Alabama, hereby certify that the above and foregoing statement is true, complete, and correct, and that the fee or reward above described is due and unpaid.

.....
JOHN MATHEWS, as Clerk of the Circuit Court of Montgomery County, Alabama.' "

In view of the fact that all clerks will be interested in this matter, we have set out this letter at length.

In answer to the second part of your inquiry No. 1, you are advised that the court determines and fixes the conditions of probation according to Title 42, Section 22, Code of Alabama 1940. The court has a broad discretion in fixing the terms of probation and among those conditions enumerat-

ed in the statute the court may require the probationer to "pay the fine imposed, or costs of such portions thereof, as the court may determine, and in such installments as the court may direct; . . . " You will note, however, that in answering the first part of your inquiry No. 1, it is stated that the fifty dollar fee or reward provided for in Title 29, Section 102, Code of Alabama 1940, as amended by Act No. 699, supra, is not now an item of cost and cannot appear in the cost bill. It is simply a charge required by law to be paid by the Alabama Alcoholic Beverage Control Board. Therefore, if the court, in fixing the terms of probation, requires the probationer to pay costs, such order or condition would not require the payment of the fifty dollar fee herein discussed for the reason that the said amount is not a cost of court.

If at any time a court imposes upon a probationer as a condition of his probation that he pay fifty dollars to the Alabama Alcoholic Beverage Control Board as reimbursement for the fifty dollars which the Alabama Alcoholic Beverage Control Board pays under the provisions of Section 102, as amended, supra, such act of the court would be a judicial act reviewable by the courts and not by the Attorney General's Office. The reasonableness or such condition of probation may be decided by the courts when the question arises and in proper judicial proceedings. This office simply holds that if a court requires as a condition of probation the payment of costs, such condition does not include the amount of fifty dollars required to be paid by Section 102, as amended, supra.

In answer to your inquiry No. 2, it is my oopinion that Act No. 699, supra, applies to cases wherein the conviction occurred on or after September 17, 1953, the effective date of said act. Section 102, as amended, supra, provides in part as follows:

> "Whenever any person is convicted in the Circuit Court . . . there shall be charged to the Alabama Alcoholic Beverage Control Board . . . the sum of fifty dollars."

It is evident that the charge against the Alabama Alcoholic Beverage Control Board cannot be made until a person is convicted on or after the effective date of the amendment, September 17, 1953. Therefore, even though the indictment was returned prior to the passage of Act No. 699, supra, it is the date of conviction which determines whether or not the charge should be made against the Alabama Alcoholic Beverage Control Board or charged in the bill of costs, as provided for in Section 102, supra, before amendment.

Very truly yours,

SI GARRETT
Attorney General

November 17, 1953

Hon. G. H. Boyd, Register
Circuit Court
Jefferson County
Birmingham, Alabama

Absentee Ballots—Elections—Municipalities—Registers.
The city clerk or officer performing the duties of clerks handles absentee ballots for a municipal bond election held at the same time as a state wide special election on constitutional amendments, because said special election is not a general or primary election within the meaning of Section 18, Act. No. 424, General and Local Acts 1949, page 601.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of November 5, 1953, is as follows:

"Re: Act Number 424, Absentee Ballots, approved August 19, 1949, and amended August 11, 1950.

"Confirming our telephone conversation today, please furnish me with an official opinion on the following:

"Section 18 of the aforesaid Act provides, among other things, as follows:

" 'In any municipal election that is held at a time different from a primary or general election, the duties, with reference to the handling of absentee ballots which are required in this Act to be performed by the Register, shall be performed by the Clerk or other officer performing the duties of Clerk . . . '

"On December 15, 1953, there will be a statewide election on the several amendments to the Constitution of Alabama. On the same day, the City of Birmingham will hold an election for the approval of a bond issue. The County and City officials have entered into an agreement whereby the County will handle and be responsible for both elections.

"I would appreciate your opinion as to whether or not the Register is authorized and shall handle the absentee ballots for both elections, namely the amendment election and the bond issue election.

"I call your attention to the following citations for your considerations:

"Volume 57, page 93.

"Volume 58, page 43.

"Inasmuch as the time is drawing near when absentee ballots shall be abailable to the electors, I would appreciate very much your prompt attention."

In my opinion the proper person to handle absentee ballots for the municipal bond election referred to in your inquiry is the Clerk of the City of Birmingham, or other officer performing the duties of the Clerk of the City of Birmingham, and not the Register of the Circuit Court.

Section 18 of Act No. 424, General and Local Acts 1949, page 601, is quoted in part in your inquiry. To me, the quoted part is too clear to require construction. It is to be noted in Section 1 of Act No. 424, supra, that the act providing for absentee voting applies to primary, general, special and municipal elections. All four types of elections are specifically enumerated. It is further to be observed that in Section 11 of Act No. 424, supra, the four types or classes of elections are again enumerated. It is evident, therefore, that in enacting Act No. 424, supra, the Legislature clearly had in mind that there were four separate and distinct types of elections which were to be covered by the Provisions of the absentee voting law.

It appears to be the intention of the Legislature in Act No. 424, supra, for the register to handle all absentee ballots in primary, general, special and municipal elections (which municipal elections are held at the same time as a primary or a general election). It is further apparent that when the municipal election is held at a time different from the time of holding a primary or general election that the clerk of the city or the officer performing the duties of the clerk handles absentee ballots rather than the register. It so happens that in the case outlined in your inquiry, the Legislature set the time for holding the election or constitutional amendments at the same time as that fixed for the municipal bond election. This may be considered as a coincidence and does not affect the clear provisions of Section 18, supra, although it might be convenient for the register who handles absentee ballots in the special election on the constitutional amendments on December 15, 1953, to also handle the absentee ballots in the municipal bond election.

It is my opinion that Section 18, supra, would prohibit any person but the city clerk or the officer performing the duties of the clerk from handling absentee ballots in the city election.

Very truly yours,

SI GARRETT
Attorney General

November 17, 1953

Hon. W. D. Kendrick, President
Commission of Jefferson County
Departments of Finance
Courts, Buildings and Purchases
212 Court House
Birmingham, Alabama

Courts—Inferior Courts—Municipalities—Constables—Justices of the Peace.

1. The resolution of the Board of Registrars of Jefferson County consolidating precincts did not affect territorial jurisdiction of the court established by Act No. 33, General Acts 1933, page 15, nor the right to compensation or title to office of the judge and deputy clerk.

2. The offices of justice of the peace and constable are abolished when the precinct wherein they hold office is abolished.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1953, is as follows:

"I enclose herewith a certified copy of a resolution adopted by the County Commission of Jefferson County, Alabama, on the 4th day of August, 1953, which said resolution requests that you give your official opinion to the County Commission of Jefferson County, Alabama, on the two questions stated in said resolution and also set forth below.

"The questions above mentioned pertain to the North Birmingham Branch of the Municipal Court of Birmingham. Said Branch was created by Act 33 of the Legislature of Alabama of 1933, approved March 8, 1933 (Local Acts of Alabama 1933, page 15 et seq). Said Act provided that the territorial jurisdiction of said court, and particularly as it relates to said Branch, shall include Precinct 42 in Jefferson County, Alabama.

"Under the authority of Act No. 695 of the Legislature of Alabama of 1951, approved September 5, 1951 (Acts of Alabama 1951, page 1198, et seq), the Board of Registrars of Jefferson County, Alabama, adopted a resolution on July 7, 1953 consolidating Precincts 21, 37 and 42 into one Precinct which was designated as Precinct 21. A copy of the last mentioned resolution is attached as an Exhibit to the resolution adopted by the County Commission of Jefferson County mentioned in the first paragraph of this letter.

"The questions upon which the County Commission of Jefferson County, Alabama, requests your official opinion, in the resolution adopted by the said Commission, are the following:

"(1) In what respect, if any, did the resolution of the Board of Registrars of Jefferson County, Alabama adopted on July 7, 1953, above mentioned, affect the territorial jurisdiction of the Municipal Court of Birmingham as established by Act. No. 33 of the Legislature of Alabama of 1933, approved March 8, 1933 (Local Acts of Alabama 1933, page 15 et seq)?

"(2) Did said resolution of the Board of Registrars affect the title to office, or the right to compensation or fees pertaining to office, of any of the following:

"The judge, the deputy clerk and the constable who prior to the adoption of said resolution were elected, appointed or assigned to serve the Branch office of the Municipal Court of Birmingham established by said Act No. 33 of the Legislature of Alabama of 1933, and who are still holding their respective offices unless their title thereto has been affected by said resolution of the Booard of Registrars of Jefferson County, Alabama?

"The County Commission of Jefferson County, Alabama will appreciate your official opinion on the foregoing questions at your earliest convenience."

The Municipal Court of Birmingham was created by Act No. 124, Local Acts of 1915, page 231, as an inferior court in lieu of all justices of the peace and notaries public exercising the powers of justices of the peace and of all other inferior courts created in lieu of the justices of the peace. Such court, as created, was to have and exercise jurisdiction, both civil and criminal, in the following precincts of Jefferson County, Alabama, Nos. 10, 21, 34, 37 and 46, and all other precincts lying within or partly within the city of Birmingham, except precincts Nos. 29, 45, and 52. **State ex rel. Griswold v. Lea**, 211 Ala. 68, 99 So. 170. The statute creating this court was upheld in **McGehee v. State, ex rel. Tate**, 199 Ala. 287, 74 So. 374.

Section 21 of Act No. 124, supra, included within the jurisdiction of this court, civil causes arising in Precinct No. 42 of Jefferson County, Alabama. Act No. 33, Local Acts of 1933, page 15, established a branch of the Municipal Court of Birmingham in Precinct No. 42 to exercise jurisdiction over the civil causes within this area.

The County Board of Registrars of Jefferson County under authority of Act No. 695, General and Locals Acts of 1951, page 1198, consolidated precincts Nos 21, 37, and 42 into one precinct designated precinct No. 21. The consolidation of these precincts thereby abolished precincts Nos. 37 and 42. Section 5 of Act No. 695, supra, states as follows:

"The Board of Registrars shall have complete and exclusive power to establish, change, consolidate or alter election districts or precincts and

to designate voting places, to the same extent as the County Commission, Board of Revenue or other governing body of such county now has under Chapter 1, Article 6, Title 17, Alabama Code of 1940, and shall have and perform all powers, functions and duties of such governing body and of the Judge of Probate as prescribed in said Article."

I am of the opinion that the action taken by your County Board of Registrars, consoolidating precincts Nos. 21, 37, and 42, had no effect on the territorial jurisdiction of the court established by Act No. 33, supra. The Constitution of Alabama 1901, Section 171, states "The legislature shall have the power to abolish any court, except the Supreme Court and the probate courts, whenever its jurisdiction and functions have been conferred upon some other court." Therefore, this court can be abolished only by an act of the Legislature, and the area formerly designated precipct No. 42 continues to be the area over which it exercises jurisdiction. The fact that precinct No. 42 has been abolished does not confuse the area of jurisdiction.

Answering your second inquiry, I am of the opinion that the resolution of the Board of Registrars did not affect the title to office or the right to compensation of the judge and deputy clerk for the division of the court created in precinct No. 42, for the reasons set out above. However, the office of constable was abolished in precinct No. 42. It is well settled that the offices of justice of the peace and constable are abolished when the precinct wherein they hold office is abolished. See **State v. Sawyer**, 139 Ala. 138, 36 So. 545. The sheriff of Jefferson County shall execute all process issued from this branch court as provided in Section 7 of Act No. 33, supra.

Very truly yours,

SI GARRETT
Attorney General

November 19, 1953

Miss Berniece H. Centanne
City Clerk
City of Prichard
Mobile County
Prichard, Alabama

Municipalities—Mayor—Census—Salaries.

The salary of the Mayor of Prichard, fixed by ordinance under the provisions of Title 37, Section 440, Code of Alabama 1940, as amended by Act No. 315, General Acts 1945, page 506, prior to the beginning of his term at the maximum rate for the

mayor of cities having ten thousand and up to twenty-five thousand population ($4,500.00 per annum), became effective on August 3, 1953, the reclassification date under Title 1, Section 14, Code of Alabama 1940, as amended by Act No. 174, General and Local Acts 1951, page 415.

Opinion by Assistant Attorney General Sykes.

Dear Madam:

Your request for an official opinion, bearing date of October 15, 1953, is as follows:

"Will you please be kind enough to render your official opinion as Attorney General of the State of Alabama upon the following:

"I enclose herewith a copy of an Ordinance which was adopted at a regular meeting of the City Council of the City of Prichard held on August 25, 1952. The adoption of this Ordinance was based on the population of the City of Prichard according to the 1950 federal census (Poplation of 19,014) and in accordance with Title 37, Section 440, Alabama Code.

"I wish to clarify the date that the salary provided for in Ordinance 561 would be effective and should the effective date be prior to this date, would payment be made retroactive to the effective date."

The ordinance referred to in your inquiry appears to have been published in a newspaper on August 28, 1952. The ordinance as it was published appears as follows:

"LEGAL NOTICE

"Ordinance No. 561

"BE IT ORDINATED BY THE CITY COUNCIL OF THE CITY OF PRICHARD, ALABAMA, AS FOLLOWS:

"SECTION 1. That the salary of the Mayor of the City of Pichard, Alabama, shall be and the same is hereby fixed at $375.00 per month.

"SECTION 2. This Ordinance shall become effective on the first Monday in October, 1952, and shall continue in full force and effect until repealed by action of the Council.

"Approved:

"G. V. DISMUKES, Mayor

"Attest:

"BERNIECE H. CENTANNE, Clerk

"The Citizen: August 29, 1952."

In my opinion Ordinance No. 561, supra, became effective on August 3, 1953. It is further my opinion that the mayor's salary should be paid at the rate set out in the ordinance on and after that date (August 3, 1953).

Although it is not stated as a fact in your inquiry, it is known that the Mayor of Prichard was elected on the third Monday in September of 1592 (Title 37, Section 404, Code of Alabama 1940). The third Monday in September 1952 occurred on September 15, 1952. The term of the mayor, I also know, began on the first Monday in October 1952 (Title 37, Section 27, Code of Alabama 1940, and Act No. 465, General Acts 1945, page 699). Therefore, the present term of the Mayor of Prichard began on October 6, 1952.

At the time that the mayor's term began, the ordinance had been enacted and had become a law on August 28, 1952, the date of the publication of said ordinance (Title 37, Section 457, Code of Alabama 1940). By the terms of the ordinance which was validly enacted in August 1952, the salary of the mayor, at the rate of $375.00 per month or $4500.00 per annum, was not to become effective until the first Monday in October, 1952, the same date that the term of the present mayor began. However, on that date, October 6, 1952 (the first Monday in October 1952), the 1950 Census, except for certain specified purposes here not relevant, had not become effective, although preliminary figures had been published. The 1950 Census did not become effective until August 3, 1953, which was the ninetieth day after the first day of the first regular session of the legislature after the formal publication of the 1950 Census. See, Constitution of Alabama 1901, Amendment XVII; and **Henry Haralson v. State of Alabama, ex rel. Herman L. King, et al.**, in the Supreme Court of Alabama, 7th Division 211, rendered October 29, 1953; and Title 1, Section 14, Code of Alabama 1940, as amended by Act No. 174, General and Local Acts 1951, page 415.

This office has already held that neither the provisions of Section 68 nor Section 281 of the Constitution of Alabama 1901, nor Title 37, Section 411, Code of Alabama 1940, prohibit the automatic increase, during the term, of the salary of a mayor fixed by law previous to his term. Opinion of the Attorney General under date of September 29, 1953, to Hon. Q. P. Flournoy, Mayor, City of Chickasaw, Chickasaw, Alabama (Ms.).

It results, therefore, that the ordinance referred to in your inquiry, fixing the salary of the Mayor of Prichard at the maximum rate prescribed by Title 37, Section 440, Code of Alabama 1940, as amended by Act No. 315, General Acts 1945, page 506, could not become effective until the publication of the 1950 Census on August 3, 1953. In my opinion the ordinance became effective on that date, and the mayor should be paid his salary at the rate of $375.00 per month on and after that date.

Very truly yours,

SI GARRETT
Attorney General

December 4, 1953

Mrs. Alice J. Duck, Register
Circuit Court
Baldwin County
Bay Minette, Alabama

Commissions—Fees—Registers.

A register selling land which is the subject matter of a partition proceeding in the circuit court is entitled to compensation as provided in Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262.

Opinion by Assistant Attorney General Sykes.

Dear Mrs. Duck:

Your request for an official opinion, bearing date of October 15, 1953, is as follows:

"There is a partition proceeding now pending in the Circuit Court of Baldwin County, Alabama, in Equity, in which I, as Register of the said court, have been appointed as commissioner to sell the lands involved in the said proceeding.

"The said lands have been sold by me, as commissioner, and in figuring the commission on sales, I have figured the commissions as provided in and by Title 11, Section 27 of the 1940 Code of Alabama, as amended by an act approved August 16, 1947. The commission on the said sales, when figured as provided in the said section, exceeds the sum of $100.00.

"The attorney for the complainant in the said suit takes the position that because of Title 47, Section 215 of the 1940 Code of Alabama, your opinion addressed to the Register of Marengo County, dated September 14, 1939 (Reports, Attorney General, Quarterly Report, June-September, 1939, page 239) and the holding in the case of Walsh v. Walsh, 231 Ala. 305, 164 So. 822, my commission for the said sales cannot exceed the sum of $100.00.

"I will appreciate your giving me an immediate opinion as to whether commissions on sales in such cases are figured as provided in Title 11, Section 27, as amended, or according to Title 47, Section 215 of the 1940 Code of Alabama."

It is my opinion that your commission on the sale of the land, the subject matter partition proceedings, under an order or decree of a circuit court, sitting in equity, should be figured as provided in Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262.

The pertinent part of Section 27, as amended, supra, is as follows: "Commissions on sales: For the first three hundred dollars, two per cent; for all over three hundred dollars, and not exceeding two thousard dollars, one and one-half per cent; for all over two thousand dollars and not exceeding twenty thousand dollars one per cent; and for all over twenty thousand dollars, one-fourth of one per cent."

"There is no ambiguity in this language. It definitely and in detail fixes your compensation for sales made under orders and decrees of the circuit court, sitting in equity. . . . The right to this fee hinges on whether or not you made a sale under such orders." Quarterly Report of Attorney General, Vol. 27, page 58. See also Quarterly Report of Attorney General, Vol. 57, page 82.

Title 47, Section 215, Code of Alabama 1940, and the opinion of this office addressed to the Register of Marengo County (Quarterly Report of Attorney General, Vol. 16, p. 237) have to do with partition proceedings in probate courts; and Walsh v. Walsh, 231 Ala. 305, 164 So. 822, is a case concerning compensation of executors and administrators for the sale of land owned by an estate. In both of the last mentioned situations, the compensation is by statute limited to $100.00; however, I know of no authority that puts such a limitation on the compensation of a register, selling for division under a decree or order of a circuit court, sitting in equity.

Very truly yours,

SI GARRETT
Attorney General

December 4, 1953

Hon. J. T. McLaughlin, Mayor
City of Frairfield
Jefferson County
Fairfield, Alabama

Census—Municipalities—Taxation—Licenses.

1. Act. No. 845, General Acts 1953 (Ms.) approved September 19, 1953, authorizes a municipality to have conducted a special federal census.

2. A special federal census for municipalities under the provisions of Act No. 845, supra, may be conducted within a period of less than five years from the last federal decennial census.

3. A city or town may conduct more than one special federal

census in accordance with Act No. 845, supra, between two federal decennial census periods.

Opionion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 13, 1953, is as follows:

"The City of Fairfield, a municipal corporation located in Jefferson County, Alabama, extended its corporate limits since the last decennial federal census was taken in 1950. Act No. 845 of the Legislature of Alabama approved September 19, 1953, states that any city or town may, by ordinance, provide for a census of all persons residing within the corporate limits of such city or town to be taken by the Bureau of the Census of U. S. Department of Commerce but no such census may be conducted more often than every five years.

"There are certain revenues which are distributed to the City of Fairfield on a population basis. These revenues are set forth in an opinion rendered by Assistant Attorney General Barton dated October 21, 1952. At the time this opinion was rendered, the City of Fairfield could not use the results of a special census for distribution of revenues on a population basis.

"Since the passage of Act No. 845 (Senate Bill 142 by Andrews) the City of Fairfield is interested in taking a special federal census in accordance with the provisions of this act. The Federal Census Bureau in Washington will take a special federal census of the City of Fairfield and the City will pay the expense of the special census:

"A. If a special federal census is taken prior to the calendar year 1955 in accordance with Act No. 845 approved September 19, 1953, may the City of Fairfield use the results of the special federal census for receipt of all revenues distributed on a population basis?

"B. If the answer to the above question is to the effect that a special federal census cannot be taken prior to the calendar year 1955 and the results used for receipt of all revenues distributed on a population basis, then what is the earliest date a special federal census may be taken for this purpose?

"C. May a city within the State of Alabama take more than one special federal census in accordance with Act No. 845 between two decennial federal census periods and use the results of the special census for receipt of all revenues distributed on a population basis,"

In my opinion, your inquiry designated A should be answered in the affirmative, making unnecessary an answer to your inquiry B.

Your inquiry C is also answered in the affirmative.

Sections 1 and 2 of Act No. 845, General Acts 1953 (Ms.), approved September 19, 1953, provide as follows:

"Section 1. Any city or town may, by ordinance, provide for a census of all persons residing within the corporate limits of such city or town to be taken by the Bureau of the Census of U. S. Department of Commerce, but no such census may be conducted more often than every five years.

"Section 2. Any census taken under the provisions of this act shall be used only as the basis for any law which provides for the levy or collection of license taxes where such levy or collection of license taxes is based on population, and as the basis for any law which provides for the distribution of state-collected or county-collected licenses, excises, revenues, or funds where such distribution is administered or distributed on a population basis. Such census shall be used in administering any such laws as soon as such census is certified by the Bureau of the Census, U. S. Department of Commerce, and proclaimed by the governing body of the city or town providing for the taking of the census. Provided, however, that where a municipality is annexed or otherwise merged with another municipality it shall not be necessary to take a census as provided herein but the population of the municipality to which such other municipality is annexed or merged shall be the combined total of the population of each such municipality according the the last Federal Census and such total population shall be the official census of such city."

In an opinion of this office under date of October 21, 1952, found in Quarterly Report of Attorney General, Vol. 69, page 18, it was held that a special federal census may not be used to determine the population of a municipality for the purpose of distribution to the municipality of funds derived from certain tax resources. This opinion, of course, was written before the passage and approval of Act No. 845, supra, and was correct when written. In view of the passage of Act No. 845, supra, said opinion is not controlling.

The taxes and funds to which you refer are (1) cigarette and tobacco taxes distributed according to Act No. 414, General Acts 1947, page 304; (2) profit distributed from Alabama Alcoholic Beverage Control Board liquor stores, distributed under the provisions of Act No. 255, General Acts 1943, page 226, as amended by Act No. 526, General and Local Acts 1951, page 915; (3) excise tax on beer distributed under provisions of Act No. 662, General and Local Acts 1951, page 1132; and (4) state shared gasoline tax provided for in Title 51, Section 657, Code of Alabama 1940, as amended by Act No. 20, General Acts 1943, page 20.

The above cited laws, in providing for distribution to municipalities, provide respectively as follows:

"And three-fourths shall be distributed to the municipalities within the county, on a population basis, according to the last or any subsequent federal census."

"Shall be apportioned among, and paid to, the several incorporated cities and towns in the State on the basis of the raito of the population of each such city or town to the total population of all such cities and towns."

"And three-eights of said proceeds shall be prorated and distributed to the municipalities within the county upon the basis of their respective populations, according to the federal census at the time distribution is made."

"The said monthly deduction of five thousand two hundred and ten dollars shall be set aside in a fund to the credit of the several cities and towns in the State incorporated prior to January 1, 1943, and said fund shall be semi-annually apportioned among, and paid to, the several incorporated cities and towns in the State on the basis of the ratio of the population of each such city and town to the total population of all such cities and towns, according to the then last federal census."

It is to be noted that these statutes, in making the distribution of taxes and funds on a population basis to the municipalities, either refer to the "last or any subsequent federal census" or merely to the population of such city or town without reference to the last federal census.

The last federal decennial census became effective according to Title 1, Section 14, Code of Alabama 1940, as amended by Act No. 174, General and Local Acts 1951, page 415. Said Section 14, as amended, supra, provides as follows:

"Section 14, Reclassification date.—The ninetieth day after the first day of the first regular legislative session held next after the publication by the federal government of the regular federal decennial population census for Alabama is hereby fixed as the date for any reclassification under any law requiring classification based on such said census. The provisions of the preceding sentence shall not apply to any law passed by the 1951 Regular Session of the Legislature of Alabama. The provisions of this section shall not apply to any law which provides for the levying or collecting of license taxes on a population basis or the distribution of State and County collected or administered revenues or funds on a population basis; and the population as disclosed by any federal decennial census, as soon as the same is proclaimed, published or certified by the Director of the United States Census Bureau, shall be used in administering any such law."

It is to be noted that, so far as the distribution of state and county collected or administered revenues or funds on a population basis is concerned, the 1950 census was to be used as soon as said census figures were proclaimed published or certified by the Director of the United States Census Bureau. Therefore, the preliminary 1950 census was to be used as a basis for the distribution of state and county collected or administered revenues or funds which were required to be distributed on a population basis at least as early as September 11, 1951, the date upon

which the Director of the Bureau of the Census advised the Governor of Alabama of the preliminary 1950 census. It was not until August 3, 1953, that the 1950 census became effective as a reclassification date of all purposes. See **Henry Haralson v. State of Alabama, ex rel. Herman L. King, et al.**, in the Supremen Court of Alabama, 7th Div. 211, rendered October 29, 1953 (Ms.).

So at present, the 1950 federal decennial census is effective for all purposes, but Act No. 845, supra, approved September 19, 1953, authorizes cities and towns in Alabama to have the United States Bureau of the Census to conduct a special municipal census. Act No. 845, supra, provides that such special census may not be conducted more often than every five years. This act further allows the special census, when certified by the Bureau of the Census and proclaimed by the governing body of the municipality, to be used as a basis for the distribution of state collected or county collected licenses, excise, revenues or funds where such distribution is required to be made on a population basis. Act No. 845, supra, was effective upon its passage and approval by the Governor on September 19, 1953. There is no provision in said Act No. 845 requiring the municipality to wait for a period of five years after the 1950 census.

I am of the opinion, therefore, that the City of Fairfield may cause a special census to be conducted according to the provisions of Act No. 845, supra, prior to the calendar year 1955 and at any time after the passage and approval of Act. No. 845, supra (September 19, 1953). When such census has been conducted and has been certified by the Bureau of the Census, it becomes effective for the purposes enumerated in Act No. 845, supra, when the said census is proclaimed by the governing body of the city or town. When so proclaimed, it is my opinion that the special federal census is to be used as a basis for determining the share of the City of Fairfield in the distribution of state collected or county collected licenses, excises, revenues or funds where the law requires the distribution to be administered on a population basis.

An answer to your inquiry B is unnecessary in view of my answer to your inquiry A.

In answer to your inquiry C, it is my view that it is possible for a city within the State of Alabama to take more than one special federal census in accordance with Act No. 845, supra, between two decennial federal census periods, and when properly taken, the results of the special census may be used as a basis for the receipt by the municipality of state collected or county collected licenses, excises, revenues or funds required to be distributed on a population basis. In my answer to your first inquiry, I stated that Act No. 845, supra, did not require a municipality to wait for a period of five year after the last federal census to conduct a special municipal census. If the City of Fairfield causes to be conducted a special federal census in 1953 or in 1954, time enough would remain before 1960 federal decennial census. The only restriction upon the conducting of special federal censuses is that "no such census may be conducted more ofter than every five years." It is my information that a

census determines the population of an area at a set date; for example, the 1950 decennial census determines the population of various areas as of April 1, 1950, although the results of the census were not known until a later date and did not become effective until August 3, 1953 (except for certain purposes). Section 14, as amended, supra, and **Henry Haralson v. State of Alabama, ex rel. Herman L. King, supra.**

No doubt, if the City of Fairfield causes a special federal census to be made, the Bureau of the Census will determine the population of the City of Fairfield as of a certain date, say March 15, 1954. The results of the special federal census for the City of Fairfield will probably not be known or certified to the city governing body until a later date, say, May 1, 1954, and the city governing body would in all probability proclaim the results of the census at a still later date, say, May 15, 1954. In my opinion, another special federal census could not, under the above illustration, be conducted under the provisions of Act No. 845, supra, until on or after March 15, 1959. In other words, a period of five years must intervene between the dates upon which the census is established.

In conclusion, it should be stated that a federal decennial census which becomes effective after the effective date of a special municipal census would, of course, be used as the basis rather than the prior special census.

Very truly yours,

SI GARRETT
Attorney General

December 8, 1953

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Judges of Probate—Costs and Fees—Filing Tax—Records—Constitutional Amendments.

1. A judge of probate is not entitled to twenty-five cent fee for "certificate without seal of office" for making certificate on deed or mortgage that filing tax has been paid.

2. A judge of probate is entitled to twenty-five cent fee for "certificate without seal of office" for making a certificate on tax-exempt deeds and mortgages that no tax has been collected.

3. A judge of probate on salary basis is required to collect and pay into the county treasury the twenty-five cen fee for making a certificate on tax-exempt deeds and mortgages that no tax has been collected.

4. A judge of probate is entitled, by virtue of Title 47, Section 97, Code of Alabama 1940, as amended by Act No. 281, General Acts 1953, approved August 5, 1953, to twenty-five cent fee for "certificate without seal of office" for making certificate of recordation on all instruments required to be recorded.

5. The twenty-five cent fee for certificate of recordation authorized by Section 97, as amended, supra, is collectible by incumbent judge of probate as of effective date of Act amending said section, the allowance of said fee not being an increase of salary, fees, or other compensation within the intendment of Section 281, Constitution of Alabama 1901, or the the constitutional amendment proposed by Act No. 748, General and Local Acts 1951, page 1297.

6. A judge of probate on salary basis is required to collect and pay into the county treasury the twenty-five cent fee for certificate of recordation authorized by Section 97, as amended, supra.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of October 15, 1953, is as follows:

"I would like your official opinion on a matter that concerns the Probate Judges of the State of Alabama. Will you please give me your official opinion on the following questions:

"1. Under Act No. 769, 1953 Session of the Legislature, approved September 17, 1953, which amends Section 618, Title 51, 1940 Code of Alabama, which requires a Probate Judge to make a certificate on each instrument filed by a tax exempt organizatoin or person that no deed tax has been paid on said instrument, is a Probate Judge on fee entitled to 25c certificate fee as provided in Title 11, Section 29, 1940 Code of Alabama?

"2. In the event your answer to No. 1 above is in the affirmative, is a Probate Judge on salary required to collect the 25c certificate fee where the law placing him on salary required that he collect all fees now allowed by law and pay them into the County Treasury?

"3. Under Act No. 770, 1953 Session of th eLegislature, approved 17 September 1953, amending Section 619 of Title 51, 1940 Code of Alabama, requiring all Probate Judges to make a certificate on all instruments filed by tax exempt organizations or persons that no mortgage tax was collected on said instrument, is a Probate Judge on fee entitled to the 25c certificate fee allowed by Title 11, Section 29, 1940 Code of Alabama?

"4. If your answer to No. 3 above is in the affirmative, will a Probate Judge on salary be liable for the collection of this fee where the law

placing him on salary requires him to collect all fees now allowed by law and pay them into the County Treasury?

"5. Under Act No. 281, 1953 Session of the Legislature, approved 6 August 1953, amending Section 97, Title 47, 1940 Code of Alabama, is a Probate Judge who is on fee entitled to the 25c certificate fee provided for by Title 11, Section 29, 1940 Code of Alabama, for making the certificate required by this section?

"6. If your answer to No. 5 above is in the affirmative, will a Probate Judge who is on salary be liable for the collection of this 25c fee where the law placing him on salary requires him to collect all fees now allowed by law and pay them into the County Treasury?

"As it is very important to the Probate Judges on salary to know whether they are required to collect these fees or not, I would greatly appreciate your prompt reply to this letter.

"You may use this as your authority to withdraw any request for an opinion on these two Sections made by me prior to the passage of the Acts referred to above and substitute this request in lieu thereof."

I.

Your first and third questions are answered affirmatively.

Acts Nos. 769 and 770, General Acts 1953, both approved September 17, 1953, amend Sections 618 and 619, respectively, of Title 51, Code of Alabama 1940. These two sections provide for the levying of a privilege or license tax upon deeds, mortgages, and similar instruments, which must be paid before the instruments are admitted to record. The judge of probate is required to place a certificate upon the instrument to the effect that the deed or mortgage tax, as the case may be, has been paid. The same amendatory provision is contained in both Acts Nos. 769 and 770, supra. This provision is that if either the deed tax (Section 618, supra) or the mortgage tax (Section 619, supra) is not required to be paid because the instrument in question has been executed to a tax-exempt institution or person (see, for example, Federal Land Bank v. Crosland, 261 U. S. 374, 43, S. Ct. 385, 67 L. Ed. 703) the probate judge shall make a certification to that effect, which certification shall thereupon entitle the instrument to be recorded, without payment of tax, by the same, or another, tax-exempt institution or person. (A non-exempt transferee of the instrument, however, must pay the tax in order to record his title.)

You have inquired whether a probate judge is entitled, for making the certification that no tax has been collected, to the fee of twenty-five cents provided by Title 11, Section 29, Code of Alabama 1940 (as amended in respects not here material), for making a "certificate without seal of office." You are advised that such a fee is allowable. First, however, I think it necessary to discuss the compensation afforded in the case of instruments which are subject to deed or mortgage tax.

Compensation for making the certificate that such tax has been collected, as well as for performing other services in connection therewith required by Sections 618 and 619, as amended, supra, is expressly provided for in the following manner.

Section 618, as amended, supra, provides, in part:

" . . . The judge of probate shall receive two and one-half per cent of the amount collected by him under the provisions of this section as his commission for collecting said money, which shall be deducted from the total amount collected and retained by him when making settlement of his collections as required by law . . . "

(Before the amendment, Section 618, supra, contained, after the words, "for collecting said money," the words, "and certifying said instruments."

As will be demonstrated, however, the omission of this phrase in the amending act does not change the conclusion that no separate fee was intended for making the certification.)

In parallel fashion, Section 619, as amended, supra, provides, in part: " . . . The probate judge shall receive five per cent of the amount collected by him as compensation for his services in collecting said money, and certifying said instrument, said five per cent to be retained by him out of the money collected by him under this section; . . . "

(No change was made by the new Act in this portion of the section.)

The above-quoted portions of the two sections in question show that a single fee, in the form of a percentage of the amount of tax collected, was intended in each case for the probate judge's services both in collecting the tax as well as certifying that it has been paid. This was specifically stated in both sections as they were prior to the amendments; it is still so stated in the case of Section 619, as amended, supra. In the case of Section 618, as amended, supra, however, the omission of the phrase "and certifying said instruments" might be construed as intending the percentage fee to apply to, and compensate for, the service of collecting only, and thereby also to authorize impliedly the twenty-five cent fee for making the certification. Such a construction, however, cannot be entertained; the entire process of collecting the tax and making the certification is a single act and duty imposed upon the probate judge and the statute gives no authority for severing it into different parts in order to authorize the changing of separate fees.

The situation is analogous to that presented in the case of **Tillman v. Wood**, 58 Ala. 578. In that case the Supreme Court held that a probate judge was not entitled to the fee (then fifty cents) "for each certificate without the seal of office," prescribed by Section 5030 of the Code of 1876 (now Title 11, Section 29, Code of Alabama 1940, as amended) for his services in certifying on a deed or other recorded instrument the date of recordation and the book and page number where the instrument was entered in his records. The court decided that there was no applicable separate fee for making such certificate and that the entire compensation

allowable to a judge of probate for recording an instrument was fixed by another part of Section 5030, supra (now Title 11, Section 29, as amended, supra), at twenty cents (now fifteen cents) per hundred words.

As the court stated (58 Ala. 578, at page 581):

" . . . The registration of a conveyance is an entirety, comprehending not only the body of the conveyance, but the probate, or certificate of acknowledgment, the statute authorizes, if any are appended or endorsed, the endorsement of the day it was received for record, and the certificate of registration. Without all these, the registration is not complete, and for all the statute intends the compensation of the judge shall be at the rate of twenty cents per hundred words. It is compensation for the whole act and duty of registration, for it is a single act and duty, and its severance into distinct parts, for which distinct and separate fees may be charged, is not in consonance with the words or spirit of the statute . . . "

When the fee for a particular service is provided by statute, as here, the charging of general fees (such as that for certificates without seal of office) which might otherwise be applicable, is precluded. Biennial Report of Attorney General, 1932-34, page 55. Consequently, in the case of instruments subject to tax, the sole compensation allowable for the service performed under Sections 618 and 619, as amended, supra, is the specified percentage of the amount of tax collected.

A different situation presents itself where the instrument is exempt from tax. Prior to the amending Acts both statutes were silent as to the procedure to be followed. No certificate was required and I am informed that none was, in practice, made. Making the certificate required by Sections 618 and 619, as amended, supra, is, therefore, a new duty imposed upon probate judges and results in a new service performed for the benefit of persons recording tax-exempt instruments. A fee of twenty-five cents for certificates without seal of office prescribed by the pre-existing schedule of fees (Section 29, supra) is applicable to this service unless otherwise precluded.

As previously stated, Section 619, as amended, supra, fixes a single compensation for collecting the money and certifying the instrument. Section 618, as amended, supra, although omitting the latter phrase, must be construed in the same manner. The certificate here referred to, however, is the one stating that the tax has been paid, and not the one stating that no tax is due. That this is true is indicated both by the statutory phraseology conjoining the two actions—collecting and certifying—and by the fact that this procedure and the compensation therefor has not been changed. The sole change in the amending Acts provides for a new procedure—a new certificate—in the case of tax-exempt instruments. For this certificate no compensation has been specifically provided and the general schedule of fees becomes applicable.

Another consideration bearing on the question is whether the twenty-five cent fee may be collected by probate judges during their present term

of office, in view of the prohibitions against an increase in fees found in Section 281 of the Constitution of Alabama 1901 and, more particularly, in the recent constitutional amendment proposed by Act No. 748, General and Local Acts 1951, page 1297, and proclaimed ratified May 16, 1952.

This matter is discussed below in connection with your fifth inquiry. Suffice it to say at this point that these constitutional inhibitions do not apply to a situation where, as here, the probate judge is required to perform an additional service for which a pre-existing fee had adready—prior to this present term—been established. See **State ex rel. Ward v. Henry**, 224 Ala. 224, 139 So. 278, quoted infra.

Your second and fourth questions are likewise answered affirmatively. You inquire whether probate judges on salary are liable for the collection of the aforesaid fees, if the law placing them on salary requires them to collect all fees now allowed by law and pay them into the county treasury.

It is customary for such a provision to be inserted either in the constitutional amendment authorizing a salary basis of compensation, or in the local enabling act placing the probate judge on salary. See, for example, Quarterly Report of Attorney General, Vol. 47, page 162. Even if this were not done, however, the same result would follow by virtue of Title 1, Section 16, Code of Alabama 1940. I conclude, therefore, that probate judges on salary are liable for the collection of the twenty-five cent fees for the certificates prescribed by Sections 618 and 619. as amended, supra.

II

Turning now to your fifth and sixth inquiries regarding Act No. 281, General Acts 1953, approved August 5, 1953, amending Title 47, Section 97, Code of Alabama 1940, I again call your attention to the case of **Tillman v. Wood**, supra, which is directly in point. Under the **Tillman** case, the law prior to the passage of Act No. 281, supra, was clear in that probate judges were not entitled to the twenty-five cent fee for certificates without seal for making the recording certificate required by Section 97, supra.

Act No. 281, supra, amends this section; after authorizing the use of an electric time clock in making the certificate, the Act provides as follows:

> "For making the certificate required by this section the judge of probate shall not be entitled to any additional fee for his service, other than that now provided for in Title 11, Section 29, 'Making Certificate Without Seal.'"

The intent of the statute to authorize the twenty-five cent fee (and thereby change the rule of the **Tillman** case, supra) is clear, and accordingly your fifth question is answered affirmatively. There still remains, hwoever, the question of whether this is an increase of the "salary, fees or other cempensation" of a county official which increase may not (because of the provisions of Section 281 of the Constitution of 1901 and the aforementioned constitutional amendment proposed by Act No. 748, General

and Local Acts 1951, page 1297) take effect until the term of office following that existing at the time of passage and approval of the Act.

Prior to the adoption of the aforementioned constitutional amendment, Section 281, supra, prohibited the salary, fees, or compensation of any officer holding an office of profit from being increased or diminished during the term for which he had been elected or appointed. The recent constitutional amendment restated this principle and added several provisions, the principal one being apparently designed to nullify a rule of case law which has frequently been stated by the Alabama courts (see, e. g., **Tayloe v. Davis,** 212 Alabama, 282, 102 So. 433) to the effect that an increase in salary, fees or compensation may take effect during the incumbent's term of office provided that he is given sufficent "new and additional duties."

The new amendment specifically does away with this interpretation.

So far as the instant question is concerned, however, the law is the same now as it was before the adoption of the amendment. That is to say, no new or additional duties have been imposed upon probate judges by Section 97, as amended, supra. On the other hand, neither has any provision for an increased fee been made. The effect of the Act is merely to change the conclusion reached by the Supreme Court in the case of **Tillman v. Wood,** supra, and make the twenty-five cent fee for certificates without seal applicable to the recording certificates placed by judges of probate on all instruments authorized to be recorded. The "fee" for making this certificate has not been increased; it remains at twenty-five cents. The Act is merely a legislative fiat that the same fee shall henceforth apply to certificates of that type (without seal) which are placed on recorded instruments.

It is true that the effect of the Act is to increase by twenty-five cents the over-all charge for recording an instrument—a charge which the Supreme Court in the **Tillman** case, supra, said was a single one for an entire, unified operation. But that holding was not the fixing of a "fee"; rather, it was a judicial determination that a particular fee did not apply to a particular part of the service rendered. Section 97, as amended, supra, is a legislative determination that this fee henceforth shall be applicable to the certification portion of the service. In other words, the section, as amended, supra, makes a pre-existing fee applicable to a service which, although not new, was not previously subject to the fee, but it does not increase the particular fees charged; namely, twenty-five cents for the certificate and fifteen cents per hundred words for recording the document.

Action of this sort by the legislature is not within the prohibition of the constitutional amendment. To hold otherwise would unduly restrict the power of that body to enact new legislation. The words of the court in the case of **State ex rel. Ward v. Henry,** 224 Ala. 224, 228, 139 So. 278, 282, are apt.

> "We cannot acede to the view that section 281 forbids a transfer of official duty from one officer to another, during the term of the former, because he would thereby be deprived of fees allowed for the per-

formance of such duty. The doctrine contended for by appellant would be far-reaching. For example, if valuable fees accrue to an officer, say sheriff or clerk, because of laws which greatly enhance the litigation from which he derives fees, no one would contend the Legislature could not repeal such laws because incidentally the fees of the officer would be decreased. If the judge of probate derives large income from the issuance of licenses, no one would insist the Legislature was powerless to increase or decrease the license schedule during his term of office. The insistence subordinates the public interest to an incidental one. Such is not the intention of section 281."

The reasoning applied by the court in the Henry case, supra, which involved an alleged decrease, is likewise valid in the case of an increase, as here. Consequently, it is my opinion that the provisions of Section 97, as amended, supra, took effect upon passage and approval by the Governor, and the fee of twenty-five cents thereby authorized may be collected by incumbent judges of probate from that date.

Your sixth inquiry is answered affirmatively for the same reasons given in response to your second and fourth questions. A probate judge on a salary basis, therefore, is liable for the collection of the aforementioned twenty-five cent fee from the time of the effective date of Act No. 281, supra.

Very truly yours,

SI GARRETT
Attorney General

December 15, 1953

Hon. J. M. McCullough, Jr.
Commissioner, Board of Corrections
CAPITOL

Corrections and Institutions—Prisons and Prisoners.

1. Under provisions of Act No. 833, General Acts 1953, approved September 19, 1953 (Ms.), a prisoner serving two or more sentences imposed by one court at any one session of said court is entitled to deductions for good behavior based on the aggregate sentence, each sentence to be computed and terminated separately.

2. In computing deductions from sentences for good behavior, the provisions of Act No. 833, supra, do not apply to sentences which terminated prior to September 19, 1953, the effective date of said Act.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your requests for official opinions bearing date of October 8, 1953, are as follows:

"1. In aggregating the sentences as prescribed in Act No. 534 Good Time Law is it possible to figure one long and one short time on a prisoner's sentence where he has two or more sentences or will each case have to be figured and terminated one at a time as per example:

"John Doe No. 62389 Jefferson County sentenced 10-1-53 Grand Larceny 2 yrs. 1st case, Grand Larceny 2 yrs. 2nd case, Burglary 3 yrs. 3rd case, Robbery 10 yrs. 4th case.

"Aggregating cases makes a total of 17 yrs. based on good time the deduction would be 5 yrs. 8 mos.

"2. In figuring the good time deductions on prisoners that are now in the penitentary under act No. 534 aggregating the time of indeterminates and definite sentences when a prisoner has two or more sentences and his is now serving on the 3rd case would the time be aggregated on all cases or the balance of cases he has to serve and can one long and one short time be figured or will each case have to be figured and terminated before beginning the other case or cases.

"Example:

"John Smith No. 58236 Mobile County sentenced 3-18-39 Burglary, 6 to 7 years of 5 cases. 6 to 7 yrs. in each of 5 cases based on maximum time of 35 years 3-18-74 Long Time 7-18-62 Short Time one long and one short time."

Act No. 833, General Acts 1953, approved September 19, 1953, at 11:38 a.m., amends Section 1 of Act No. 534, General Acts 1943, page 508, dealing with deductions from sentences for good conduct. Act No. 836, General Acts 1953, approved September 19, 1953, at 11:41 a.m., deals with the same subject but purports to amend Section 253 of Title 45, Code of Alabama 1940.

The Code of Alabama 1940 was adopted by Act No. 628, General Acts 1939, page 995. At the time of its adoption, Title 45 contained 252 sections. When Act No. 534, supra, was enacted, it was placed in the pocket supplement and designated Section 253, by the publisher thereof. The Pocket Supplements have not been adopted by the Legislature and hence, officially, there is no Section 253 of Title 45, Code of Alabama 1940. Therefore, it is my opinion that Act No. 836, supra, purporting to amend a non-existent Code section, is of no force and effect, and that Act No. 833, supra, now governs deductions from sentences for good conduct. See **Bluthenthal v. Trager**, 131 Ala. 639, 31 So. 622; State v. Baumhaver, 239 Ala. 476, 195 So. 869.

In answer to your first question, it is my opinion that each case must be figured separately with the amount of "good time" to be computed under the provisions of Act No. 833, supra. Thus, under the facts stated, assum-

ing the sentences were passed by one court at one session, John Doe has an aggregate sentence of 17 years. This will entitle him to ten days deduction each month. providing, of course, he meets the other requirements of the Act.

Beginning his sentence on October 1, 1953, as in your example, assuming good behavior, he would terminate the first two-year sentence on February 1, 1955, allowing eight months deduction for good behavior. He would then start his second two-year sentence. Allowing eight months deduction for good behavior he would finish that sentence on June 1, 1956. This procedure should be followed for each case and the prisoner discharged on February 1, 1965.

Act No. 833, supra, provides in part as follows:

" . . . Each prisoner who has been or shall hereafter be convicted of any offense against the laws of the State of Alabama, and is confined, in execution of the judgment or sentence upon any such conviction . . . shall be entitled to a deduction from the term of his sentence to be estimated as follows . . . When a prisoner has two or more sentences imposed by one court at any one session of said court, such sentences shall be aggregated for the purpose of computing deductions from sentences for good conduct . . . " (Emphasis supplied.)

Under the facts stated in your second inquiry, the subject prisoner was "confined in execution" of his third sentence at the time Act No. 833, supra, was passed. It is my opinion that, by virtue of the underlined portion of Act No. 833, supra, the first two sentences having been terminated must be disregarded, and the aggregation of sentences must start with the beginning of the one upon which the prisoner was serving at the time of the passage of Act No. 833, supra.

Under the law as it existed prior to September 19, 1953, the subject's first sentence was terminated, assuming good behavior, on April 3, 1944, allowing eight days per month "good time," or a total of twenty-two months and twelve days deduction. Using the same computation his second sentence would end March 21, 1949.

Under Act No. 833, supra, the maximum sentence shall be the basis for computation in cases of indeterminate sentences. With three sentences of six to seven years left to serve, the subject has over ten years aggregate sentenct left, and upon those last three sentences, deductions should be computed on a basis of ten days per month, providing said prisoner meets all requirements.

It is my opinion, based on the above, that the schedule of deductions found in Act No. 833, supra, may not be applied except to the sentence upon which a prisoner was serving on September 19, 1953, together with any other remaining sentences, all of which were imposed by one court at one session.

Very truly yours,

SI GARRETT
Attorney General

December 28, 1953

Hon. Gordon Persons
Governor of Alabama
CAPITOL

Poll Tax and Poll List—Constitutional Amendments—Elections —Registration—Voters.

The constitutional amendment which was approved by the electorate of Alabama in an election held on December 15, 1953, and was proclaimed ratified by the Governor on December 28, 1953, amending Section 178, Constitution of Alabama 1901, in regard to the payment of poll taxes as a prerequisite for voting, discussed and construed generally.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

I have your request for an official opinion, bearing date of December 16, 1953, which is as follows:

"Certain questions have arisen as to the amount of poll tax due from persons 45 years of age and over and under the amendment to Section 178 to the Constitution of Alabama 1901, which was on yesterday ratified by the voters of this state.

"This amendment is Act No. 109, S. 6 of the Acts of 1953 Legislature (MS).

"Section 194 of the Constitution of Alabama 1901 provides that all persons over the age of 21 years and under the age of 45 years are liable for poll tax.

"The effect of the amendment to Section 178 of the Constitution is, that persons offering to vote, after having registered as voters in this state, in addition to the residential requirements, shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote all poll tax due from him for the **two calendar years next preceding.**

"In view of the fact that Section 194 of the Constitution of Alabama 1901 only levies poll tax on persons between the age of 21 years and 45 years, I shall appreciate your answers to the following questions:

"1. Under the provisions of Section 178, as amended, if a person 45 years of age, is duly registered as a voter, and has not paid poll tax for some years past, and offers to pay his poll tax, how much poll tax is due from such person?

"2. Under the provisions of Section 178, as amended, if a person 46 years of age, is duly registered as a voter and has not paid poll tax

for some years past, and offers to pay his poll tax, how much poll tax is due from such person?

"3. Under the provisions of Section 178, as amended, if a person 47 years of age, is duly registered as a voter, and has not paid poll tax for some years past, and offers to pay his poll tax, how much poll tax is due from such person?

"4. Under the provisions of Section 178, as amended, if a person 48 years of age, is duly registered as a voter, and has not paid poll tax for some years past, and offers to pay his poll tax, how much poll tax is due from such person?

"5. What amount of poll tax, if any, is due from a person over 48 years of age who is a registered voter and has not paid poll tax for some years past, or who has never registered, and offers to register, and pay his poll tax after his 48th birthday?

"Your prompt attention and reply to these questions will be very helpful to me and other citizens of Alabama."

I

It is my opinion that persons who became 45 years of age or older on or before October 1, 1952, are not required to pay any poll taxes, and, if duly registered and not otherwise disqualified, such person may vote at elections held on and after February 2, 1954.

II

It is also my opinion that persons who became 45 years of age after October 1, 1952, but on or before October 1, 1953, must pay poll tax for the year 1952 only in the amount of $1.50. If said 1952 poll tax was paid on or before February 1, 1953, such persons may vote without further payment. If not so paid, such persons may pay said 1952 poll tax on or before February 1, 1954, and vote at elections held thereafter.

III

It is my further opinion that persons who become 45 years of age after October 1, 1953, and on or before October 1, 1954, must pay poll taxes for the years 1952 and 1953 on or before February 1, 1954, in order to vote at elections during the period February 2, 1954-February 1, 1955 (inclusive).

You will not, therefore, that your several questions can be answered as follows:

If a person is duly registered and has not paid poll taxes for some years, or for that matter has never paid poll taxes, he may vote in elections held during the period February 2, 1954-February 1, 1955 (inclusive), if not otherwise disqualified, if on October 1, 1953 :

He was 46 years of age or older (47, 48, etc.) and pays no poll taxes on or before February 1, 1954; or
He was 45 years of age or older, but not 46, and pays poll tax on or before February 1, 1954, in the amount of $1.50 for 1952; or
He was 44 years of age or older, but not 45, and pays poll taxes on or before February 1, 1954, in the amount of $3.00 for 1952 and 1953.

Section 178 of the Constitution of Alabama 1901 provided as follows:

"To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; provided, that any elector who, within three months next preceding the date of the election at which he offers to vote, has removed from one precinct or ward to another precinct or ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal."

The poll tax amendment to the Constitution, which was proposed by a joint resolution of the Alabama Legislature (Act No. 109, General and Local Acts 1953, passed by the Senate May 19, 1953, passed by the House June 16, 1953), was voted upon and approved by the electorate of Alabama at an election held on December 15, 1953, and was proclaimed ratified by the Governor on December 28, 1953. It amends Section 178, supra, to read as follows:

"To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the two calendar years next preceding. Provided, that any elector who, within three months next preceding the date of the election at which he offers to vote has removed from one precinct or ward to another precinct or ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal."

It is also well to note that Section 194 of the Constitution of Alabama 1901 provides as follows:

"The poll tax mentioned in this article shall be one dollars and fifty cents upon each male inhabitant of the state, over the age of twenty-

one years, and under the age of forty-five years, who would not now be exempt by law; but the legislature is authorized to increase the maximum age fixed in this section to not more than sixty years.

Such poll tax shall become due and payable on the first day of October in each year, and become delinquent on the first day of the next succeeding February, but no legal process, nor any fee or commission shall be allowed for the collection thereof. The tax collector shall make returns of poll tax collections separate from other collections."

There are several Supreme Court opinions pertinent to your inquiry. These are:

Frost v. The State, ex rel. Clements,
153 Ala. 654, 45 So. 203;

Finklea v. Farish,
160 Ala. 230, 49 So. 366;

Shepherd v. Sartain,
185 Ala. 439, 64 So. 57;

Graves v. Eubanks,
205 Ala. 174, 87 So. 587;

In Re Opinion of the Justices,
257 Ala. 712, 60 So. 686.

The poll tax is levied by Section 194 of the Constitution of Alabama 1901. It is levied, due and payable on October 1 of each year, according to the individual's age on that date (October 1). **Shepherd v. Sartain,** supra.

If on October 1 of any year a person is "over the age of twenty-one years and under the age of forty-five years" and not exempt, he owes the poll tax for that year. He owes it on that October 1; and unless he pays it on or before the succeeding February 1, he is not qualified to vote at elections held during the period February 2-February 1 (inclusive) following. Constitution of Alabama 1901, Section 178. Said section, before amendment, not only required the current poll tax to be paid on or before February 1 preceding the election, but also required the payment of all poll taxes due from the person for the year 1901, and each subsequent year.

The amendment removes most of the cumulative feature of the poll tax. The said amendment, instead of requiring the payment of all poll taxes due for the year 1901, and each subsequent year thereafter, only requires that on or before February 1 preceding the election poll taxes be paid which are due "for the two calendar years next preceding."

The question arises, therefore, as to what is meant by the phrase "for the two calendar years next preceding."

It is my opinion that this phrase has reference to the numerical designations of the two calendar years preceding the year of the delin-

quency date for the payment of poll tax, February 1, of any year.

The presumption is that the Legislature knew poll tax is not due or payable with reference to a calendar year. As stated in **Shepherd v. Sartain**, supra, the tax is levied on October 1, at the same time it is due, according to the age of the individual. The first poll tax, under the Constitution of 1901 was due and payable October 1, 1901, and delinquent February 1, 1902. All persons who were over 21 and under 45 years of age on October 1, 1901, owed the poll tax due on that date. That tax has been called and referred to as the 1901 poll tax. See **Frost v. State**, supra; **Finklea v. Farish**, supra; **Shepherd v. Sartain**, supra; **Graves v. Eubank**, supra; and **In Re Opinion of the Justices**, supra.

Thus, we speak of the current poll tax now due and payable and which became due and payable on October 1, 1953, and which becomes delinquent on February 1, 1954, as the 1953 poll tax. Similarly, we speak of the poll tax which became due and payable on October 1, 1952, and delinquent on February 1, 1953, as the 1952 poll tax. It is clear, therefore, that poll tax which becomes delinquent on any given February 1 is identified as the poll tax for the year having the numerical designation of the calendar year preceding that of the year of the February in which the delinquency occurs. For example, the poll tax which will become delinquent February 1, 1954, is called the 1953 poll tax, due and payable October 1, 1953, and the poll tax which became delinquent February 1, 1953, is called the 1952 poll tax, due and payable October 1, 1952.

When the amendment was proposed by joint resolution of the Legislature, it was known to the Legislature that it would be voted on in December, 1953, and, if approved by the electorate, would be proclaimed ratified by the Governor before February 1, 1954. The Legislature also knew that after said proclamation, and on or before February 1, 1954, there would still be time remaining for persons to pay the poll taxes necessary to qualify to vote in elections occurring during the period February 2, 1954-February 1, 1955 (inclusive). In stating how much poll tax must be paid on or before February 1, the Legislature used the phrase "all poll taxes due from him for the two calendar years next preceding." In my opinion, in respect to elections occurring during the period February 2, 1954-February 1, 1955 (inclusive), this phrase means "all poll taxes due from him for the years 1952 and 1953." With respect to such elections, the poll taxes for these years are the only poll taxes now required to be paid on or before February 1, 1954, the first delinquency date to occur after the effective date of the amendment.

I conclude, therefore, that the phrase has reference to the numerical designations of the two years next preceding the year of the delinquency date.

Thus, it is apparent that, in respect to elections held on or after February 2, 1954 and before February 2, 1955, a person's qualification to vote, so far as poll tax is concerned, is determined by his **age on October 1, 1953**, and his **payment** on or before February 1, 1954, of such poll taxes as may be due.

Your inquiry refers to persons who are 45, 46, 47 and 48 years of age and older. The present age is material only insofar as that age enables us to calculate their age on a certain October 1, the day the poll tax is levied and becomes due and payable. **Shepherd v. Sartain**, supra; **Frost v. State**, supra; **Finklea v. Farish**, supra.

It should also be noted that the amendment, in using the phrase "due from him," as does Section 178, before amendment, supra, refers to poll taxes due from each individual on a personal basis, but since I cannot here deal with individuals, it will be necessary to define and treat with certain age groups:

1. Those who became 46 years of age or older (47, 48, etc.) on or before October 1, 1953:

These persons are not required to pay any poll taxes under the amendment. Such persons became 45 years of age or older on or before October 1, 1952, and, therefore, on October 1, 1952 were not "under the age of forty-five years," hence owe no 1952 or 1953 poll tax. **Finklea v. Farish**, supra; **Shepherd v. Sartain**, supra; **Graves v. Eubank**, supra, overruling **Frost v. State**, supra. Such persons, if registered and not otherwise disqualified, may vote without paying poll tax in elections on and after February 2, 1954. They, of course, will owe no future poll tax.

Such persons had their 45th birthday on or before October 2, 1952.

2. Those persons who became 45 years of age after October 1, 1952, but on or before October 1, 1953:

These persons must pay one year's poll tax under the amendment for the year 1952, because on October 1, 1952, they were "under the age of forty-five years." They do not owe 1953 poll tax under the amentment because on October 1, 1953, they were not "under the age of forty-five years." Such persons, if registered and not otherwise disqualified, may vote in elections on and after February 2, 1954, if they pay said 1952 poll tax on or before February 1, 1954. They will owe no future poll tax.

Such persons had their 45th birthday on or after October 3, 1952, but on or before October 2, 1953.

3. Those persons who became 45 years of age after October 1, 1953, but on or before October 1, 1954:

These persons must pay poll taxes under the amendment for both 1952 and 1953 because they were "under the age of forty-five years" on October 1, 1952 and October 1, 1953. Such persons if registered and not otherwise disqualified, may vote in elections held during the period February 2, 1954-February 1, 1955 (inclusive), if they pay said 1952 and 1953 poll taxes on or before February 1, 1954. If these persons pay their 1952 and 1953 poll taxes on or before February 1, 1954, they will owe no future poll taxes; but if not so paid and such persons decide to pay their poll taxes in order to vote during the period February 2, 1955-February 1, 1956 (inclusive), they must pay on or before February 1, 1955, the 1953 poll tax but none for 1954.

Such persons had or will have their 45th birthday on or after October 3, 1953, but on or before October 2, 1954.

* *

A word of explanation should be given about calculating age. The rule which has been adopted by the Alabama Supreme Court in connection with poll tax cases is :**That a person reaches or becomes a designated age on the day preceding the anniversary of his birth. Frost v. State**, supra, **Finklea v. Farish**, supra; **Shepherd v. Sartain**, supra; **Graves v. Eubank**, supra; see also Quarterly Report of Attorney General, Val. 22, p. 71. That rule is used throughout this opinion. For example, a person whose 45th birthday is October 2 becomes forty-five years of age on the preceding October 1. Precisely, therefore, on October 1 he is not "under the age of forty-five years" as used in Section 194, supra. If October 3 is a person's 45th birthday, he becomes forty-five years of age on the preceding October 2. He is "under the age of forty-five years" for the last time on the day before that (October 1).

In your question number 5, persons over 48 years of age who have not registered are governed by the same rules concerning the payment of poll taxes as those described in Group 1, supra.

* *

Those who do not pay the proper amount of poll taxes due at the proper time are not qualified electors. Such persons cannot vote, and, furthermore, are ineligible to be elected to public office. **Finklea v. Farish**, supra. The Supreme Court of Alabama has said in effect that no one's advice excuses a person from paying all poll taxes due from him. **Shepherd v. Sartain**, supra. The conclusion reached herein represent my studied judgment of the law, and I firmly believe the same to be correct. However, I feel that, as a matter of caution, I should point out that they afford no protection to individuals relying thereon, in the event the Supreme Court should subsequently reach different conclusions.

Very truly yours,

SI GARRETT
Attorney General

December 31, 1953

Hon. Lecil Gray
Judge of Probate
Walker County
Jasper, Alabama

Judges of Probate—Costs and Fees—Notary Public—License Tags—Motor Vehicles.

1. The statement under oath required to be made by applicants for the $3 motor vehicle tags for trucks, issued under the provisions of Act. No. 775, General Acts 1953, approved September 19, 1953, need not be personally acknowledged by the judge of probate, but if he does personally acknowledge it, said judge of probate may collect the twenty-five cent fee for administering affidavits and, if compensated on a salary basis, he must collect said fee.

2. A probate judge may have a member of his staff appointed as a notary public to acknowledge the statements under oath made pursuant to the provisions of Act No. 755, General Acts 1953, approved September 19, 1953.

3. The correct charge to be made by a judge of probate for the tags issued under the provisions of Act No. 775, General Acts 1953, approved September 19, 1953, apart from the fee for acknowledging the statement made under oath, is $3.75.

4. Panel trucks and sedan deliveries are not motor trucks of the type coming within the purview of Act No. 775, General Acts 1953, approved September 19, 1953.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of October 9, 1953, is as follows:

"As President of the Probate Judges Association of Alabama, would you please render me an official opinion covering Act No. 775, 1953 session of the Legislature, approved September 19, 1953:

"1. Will a Probate Judge or officer issuing licenses under this section be required to collect the 25c certificate fee for taking the oath on the application provided for in Section 1 of said Act in counties where the law places them on salary and provides that they collect all fees now allowed by law and pay same over to the County Treasurer?
"2. If your answer is in the affirmative, is it optional or compulsory

for the Probate Judge or other issuing officer on fee to collect this 25c certificate fee?

"3. If your answer to No. 1 above is in the affirmative, is it permissible for a Probate Judge or other issuing officer to have a member of his staff appointed Notary Public to take this affidavit and be relieved of the responsibility of collecting said fee?

"4. If your reply is in the affirmative to the above 1 and 2, would a proper price for the tag be $3.00 for the tag, 75c issuance fee, 25c certificate; total $4.00.

"5. Are owners of panel trucks, sedan deliveries, etc. eligible to purchase a tag under this Act in the event that it is the sole means of transportation available to his family and the only vehicle he owns?

"Since this bill was passed the last day of the Legislature and approved on September 19, 1953, and since the Probate Judges and other issuing officers are now engaged in issuing tags under this Act, I would deeply appreciate a very prompt reply to this official opinion, as it is extremely important that the officers on salary know if they will be held accountable for the 25c certificate fee as provided for by

Title 11, Section 29."

Act No. 775, General Acts 1953, approved September 19, 1953, provides in part as follows:

"Section 1. Any other provisions of law to the contrary notwithstanding, the license and registration fee on motor vehicles designated as motor trucks which have a box or express type body of three-fourths of a ton capacity or less, and commonly known as "pick-ups' or 'pick-up trucks' shall be Three Dollars ($3.00). Provided, however, any applicant for such motor vehicle license shall, upon making application for same, execute, under oath, a statement in writing to the officer issuing such license reciting that such applicant is the owner of the vehicle and that such vehicle is the only mode or method of transportation owned by the applicant or available for his use in the household in which the applicant resides."

In reply to your first question, it is my opinion that a probate judge on a salary basis who personally acknowledges the statement required by the above-quoted section must collect the twenty-five cent fee for administering affidavits, as prescribed by Title 11, Section 29, Code of Alabama 1940, as amended by Act No. 46, General and Local Acts 1951, page 255. This is a fee allowed by law and where it is collected by an officer on a salary basis it is required to be paid into the county treasury by the provisions of Title 1, Section 16, Code of Alabama 1940, as well as by the provisions of specific constitutional amendments and enabling acts placing individual probate judges under the salary form of compensation. See Biennial Report of Attorney General, 1926-28, page 415; Quarterly Report of Attorney General, Vol. 16, page 267.

The foregoing is also true, of course, when the acknowledgment is made and the fee collected by the chief clerk of the probate court, who acts in the name of the probate judge. Title 13, Section 300, Code of Alabama 1940; **Pioneer Savings and Loan Co. v. Barclay,** 108 Ala. 155, 19 So. 308.

In reply to your second question, I know of no provision of law which would require a probate judge not on salary to collect this fee if he chooses to waive it.

Your third question is answered affirmatively. Section 1 of Act No. 775, supra, requires the applicant to "execute, under oath, a statement in writing to the officer issuing such license reciting, etc." It does not require the officer issuing the license to be also the one who acknowledges the oath. The situation is similar to the issuing of driver's licenses. The statute there (Title 36, Section 60, Code of Alabama 1940, as amended by Section 1, Act No. 485, General and Local Acts 1951, page 868) provides that the applicant "shall apply under oath to the judge of probate." This office has held (Quarterly Report of Attorney General, Vol. 16, page 267) that a notary public or any officer authorized to administer oaths or affidavits might administer the oath required of applicants for driver's licenses and furthermore that clerks in the probate offices might be appointed notaries for this purpose.

In that opinion it was stated:

"No clerk in the Office of the Judge of Probate, other than the chief clerk, may administer the affidavit required of applicants for a driver's license under the new Driver's License Law or Highway Patrol Act unless such Clerk is a notary public or such other officer as is authorized to administer oaths or affidavits. This for the reason that the provisions of the original Driver's License Law or Highway Patrol Act investing all clerks in the office of the Judge of Probate with such authority, as pointed out hereinabove, was omitted from the new Driver's License Law or Highway Patrol Act. However, it is respectfully suggested that all clerks in all probate offices in the State of Alabama may be commissioned as notaries public, and in such event, could administer the affidavit required of an applicant for a driver's license as such a notary public and would not be required to collect any fee therefor, even though such clerk, who is also a notary, might be a clerk in a probate office in a county wherein the Judge of Probate has been placed on a salary by virtue of or pursuant to the provisions of an amendment to the Constitution of Alabama and is required to collect all fees which the Judge of Probate is authorized to collect under the general laws and to cover the same into the county treasury."

It is my opinion that the same reasoning may be applied to the statute here under consideration. Acknowledgments taken by clerks in a probate office, who have been appointed as notaries, would be taken by such persons in their capacity as notaries public, and for this service they may

charge the appropriate fee. Quarterly Report of Attorney General, Vol 13, page 94. Since such persons are not on a salary basis in this capacity, however, they are not required to do so. Quarterly Report of Attorney General, Vol. 16, page 267, supra.

In reply to your fourth question, the correct charge for the tags would be four dollars where the judge of probate, or his chief clerk for him, personally acknowledges the oath and is required or, though not required, chooses to collect the twenty-five cent fee for administering affidavits. Otherwise, the charge is $3.75, three dollars of which is the license and registration fee prescribed by Section 1 of Act No. 775, supra. The remaining seventy-five cents is the issuing fee. Section 2½ of the Act provides that the tags are to be issued under the provisions of Act No. 315, General and Local Acts 1951, page 610, and Title 51, Section 714, Code of Alabama 1940, as amended by Act No. 681, General and Local Acts 1951, page 1171. The latter Act prescribes, in the case of licenses issued under Act No. 315, supra, a seventy-five cent issuing fee to be paid to the judge of probate.

Your fifth question is answered negatively. Both panel trucks and the sedan delivery type of motor vehicle have closed bodies and are not of the type known as "pick-ups" or "pick-up trucks," which are constructed with an open body and a closed cab. Consequently, the provisions of Act No. 775, supra, do not apply even though the vehicle does meet the Act's requirements as to weight, use and ownership. See opinion to Hon. Bradley Brown, Director, Department of Revenue, Jefferson County, under date of November 4, 1953.

Very truly yours,

SI GARRETT
Attorney General

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